Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

QUINN-L CAPITAL CORPORATION, et al.,

Petitioners,

v.

Royal Insurance Company of America, and
Royal Lloyds of Texas,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the statutorily mandated attorney-in-fact of a Texas Lloyds Plan insurer a member of that unincorporated association for diversity jurisdiction purposes given that the attorney-in-fact is the real party in controversy to this action and that a Texas statute requires it to be a Texas citizen?

2. Does a "relitigation" injunction against pending state court proceedings violate the Anti-Injunction Act when the prior declaratory judgment on which it is based is, at best, ambiguous as to the issue on which the "relitigation" injunction is based and when the parties to the prior judgment did not litigate that issue?

3. Does the Anti-Injunction Act prohibit a district court from issuing a declaratory judgment directed at a pending state court action when the declaratory judgment action itself is being used as a vehicle for creating the threshold judgment required under the Anti-Injunction Act's "relitigation" exception?

4. Can individuals who were not parties to a prior declaratory judgment be enjoined from proceeding in state court on the basis of that judgment when the district court refused to consider any evidence as to whether the individuals were in privity with parties to that judgment and when their intervention and then their substitution as parties were both denied by the court upon opposition by the party who sought and received the injunction against their state court action?

PARTIES TO THE PROCEEDING

The following are parties to the proceeding in the United States Court of Appeals for the Fifth Circuit:

Quinn-L Capital Corporation, et al., See Appendix A-60

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Petitioners pray that a Writ of Certiorari be issued to review the opinion and judgment of the Fifth Circuit Court of Appeals entered in these proceedings on September 27, 1993.

OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals are reported at 3 F.3d 877 (5th Cir. 1993), and 960 F 2d 1286 (5th Cir. 1992) and are set forth at A-1, and A-25 of the Appendix. Petitioners timely filed a Suggestion for Rehearing En Banc, which was denied without opinion. See A-58.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was entered on September 27, 1993. Petitioners filed a Suggestion for Rehearing En Banc, which the court of appeals' panel treated as a Motion for Rehearing in an order entered on November 5, 1993. This Petition for Writ of Certiorari was filed within ninety days of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 1332 provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States. . . .

28 U.S.C. § 2283 ("the Anti-Injunction Act") provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

A. The facts

This action arose out of litigation relating to the sale and management of limited partnerships by Quinn-L Capital Corp., Quinn-L Equities Inc., Quinn-L Financial Corp., Quinn-L Management Corp., and Quinn-L Mortgage Corp., (collectively "Quinn-L"). In 1987, Petitioners, 157 investors in the partnerships ("the Investors"), brought a lawsuit against Quinn-L and others in federal court ("the federal suit") seeking to recover the value of their lost investments. Quinn-L's liability insurers, Royal Insurance Company of America and Royal Lloyds of Texas (collectively "Royal") defended Quinn-L in the federal suit, but also filed a declaratory judgment action in federal court in 1988 ("the first declaratory action") seeking a declaration that Royal was under no duty to defend or indemnify Quinn-L with respect to the lost investment allegations in the federal suit.

Because Royal did not join the Investors in the declaratory action, they moved to intervene (R. "A-5" Ex. 12), which Royal successfully opposed. (R. "A-5" Ex. 13) After thinking that they had reached a tentative agreement to settle with Quinn-L, the Investors' counsel again sought to enter the first declaratory action, this time by substituting themselves as Quinn-L's counsel of record. (R. "A-7" Ex. 32) Once again, however, Royal succeeded in excluding the Investors by opposing the motion, which the court denied. (SJExs. "3-KK" & "3-LL")

The Investors and Quinn-L tentatively agreed to a settlement in March of 1989 that called for a judgment against Quinn-L in the federal liability suit awarding the Investors $32.5 million and for Quinn-L to assign to the Investors its claims against Royal. (R. "A-7" Ex. 53) On March 17, 1989, Royal authorized Quinn-L to go forward with the proposed settlement. (R. "A-5" Ex. 33-36; "A-7" Ex. 48; "A-11" Ex. 161)

After reviewing the proposed judgment, Royal asked Quinn-L not to go forward with the settlement, stating it had just learned that the settlement included the disposition of

claims for mental anguish. (R. "A-5" Ex. 36) Royal said it never had "been provided notice of any claim or allegation of mental anguish or other personal injury," nor had it had an opportunity to evaluate the mental anguish claim. (*Id.*) Royal stated that mental anguish might be covered under the policies and demanded Quinn-L forward to it any new pleadings alleging mental anguish.[1] (*Id.*) Pursuant to Royal's request, Quinn-L did not consummate the proposed settlement.

Royal had moved for summary judgment in the first declaratory action asserting that, since the Investors' claims did not constitute "property damage" as defined in its policies, Royal owed no duty to Quinn-L in the federal liability suit. (R. "A-5" Ex. 1, pp. 5-10) On April 14, 1989, the court found that the existing complaint in the federal liability action did not allege an "occurrence," "property damage," or "personal injury" (mental anguish) as defined by the policies, and granted Royal's motion. (R. "A-5" Ex. 6)

The Investors still wanted to settle the federal liability suit with Quinn-L (R. "A-11" Ex. 166), but found themselves hampered by the absence of mental anguish claims in their earlier pleadings. (R. "A-5" Exs. 1 & 3)[2] Therefore, the Investors moved to dismiss the federal claims against Quinn-L with prejudice and the state claims without prejudice. (R. "A-5" Ex. 29) The court entered an order to that effect on August 28, 1989. (R. "A-5" Ex. 30)

On September 13, 1989, the Investors brought an action against Quinn-L in a Texas state court in Dallas County based

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[1] Royal apparently backed away from the agreed judgment because it knew that mental anguish was covered under its policies, and, therefore, it definitely would be liable for the judgment if Royal consented to it. Under the agreement, Quinn-L was to be protected from execution on any judgment entered against it. (R. "A-7" Ex. 34) Therefore, the judgment would be used only against Royal.

[2] Prior to Royal's summary judgment motion in the first declaratory action, the Investors sought leave to amend their pleadings in the federal liability suit to include allegations of mental anguish. (R. "A-5" Ex. 23) Some Defendants opposed this request and the court never ruled on it. (R. "A-5" Ex. 23) Because of the court's refusal to rule on the requested amendment, the Investors instituted the state court action to be assured of an opportunity to assert their mental anguish claims.

entirely on Texas law, pleading, for the first time, mental anguish caused by Quinn-L's negligence and gross negligence.[3] (*Id.* at p. 21) Quinn-L forwarded the new suit papers to Royal together with a demand that Royal acknowledge coverage and defend it. (R. "A-5" Ex. 39) After a forty-day delay, Royal offered to defend Quinn-L but only under a reservation of rights.[4] (R. "A-5" Ex. 43) Without prior notice to Quinn-L and obviously not believing that it could rely on the outstanding federal declaratory judgment, which related only to the already dismissed federal liability action, Royal hired C. Randal Johnston to represent Quinn-L and instructed him to answer for Quinn-L immediately, even though no answer was due. (R. Vol. 12 Ex. "B," p. 6; C-7, pp. 31-32) Johnston filed a general denial on November 17, 1989, before Quinn-L had an opportunity to reply to Royal's offer to defend only under a reservation of rights. (R. "A-7" Ex. 62)

On January 9, 1990, Quinn-L rejected Royal's qualified defense and again demanded that Royal acknowledge coverage. (R. "A-5" Ex. 45) Despite Quinn-L's rejection, Royal continued to defend Quinn-L.[5] Johnston remained in the suit for five more months as Quinn-L's attorney (R. "A-11" Ex. 152) and engaged in conduct that resulted in damage to it.[6]

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[3] The Investors amended their petition on May 4, 1990 to allege expressly damages for "bodily injury" in addition to their claim for mental anguish. (R. "A-5" Ex. 19)

[4] In its November 14, 1989 letter, Royal admitted that the issue of coverage for mental anguish had not been adjudicated in the first declaratory action. (R. "A-5" Ex. 43, pp. 4-5)

[5] This was improper because, once an insured had rejected a reservation of rights, the insurer must accept coverage or withdraw. See *Pacific Indemnity Co. v. Acel Delivery Service, Inc.*, 485 F.2d 1169, 1173 (5th Cir. 1973) (applying Texas law).

[6] The investors served 600 requests for admission on Quinn-L by serving Johnston. (R. Vol. 12 Ex. "B-8") He "answered" them within two days by denying virtually all 600. (R. Vol. 12 Ex. "B-8" p. 48; Ex. "B-10," p. 7) By denying the requests without conducting any investigation, having no knowledge of the true facts, without consulting with his clients, and acknowledging the risk of sanctions for his conduct (R. "A-5" Ex. 48; "A-8" Ex. 79; Vol. 12 Ex. "B," p. 10; C-7, p. 147), Johnston clearly violated the Texas Rules of Civil Procedure. As a result, the state

On August 7, 1990, the state court entered judgment against the five Quinn-L entities based on the deemed admissions, awarding the 157 Investors an aggregate of approximately $741 million. (R. "A-8" Ex. 90) The Investors thus became judgment creditors of Quinn-L as well as third-party beneficiaries under the Royal policies. On September 4, 1990, Quinn-L assigned its rights against Royal and others to the Investors.[7] (R. "A-6" Ex. 4) That same day, the Investors filed a state court action in Cameron County, Texas, against Royal and others both in their capacity as assignees and in their capacity as judgment creditors. (R. "A-5" Ex. 20, p. 14) As assignees of Quinn-L, the Investors seek (1) damages caused Quinn-L by Royal's tortious conduct with respect to the defense it provided Quinn-L in the Dallas County liability action and (2) indemnity under the policies. As judgment creditors, the Investors seek the insurance afforded under the Royal policies.[8] (R. "A-5" Ex. 20)

On March 9, 1990, after the district court refused Royal's request to reopen the first declaratory action,[9] Royal filed a completely new declaratory action in federal court seeking a declaration that its insurance policies did not obligate it to defend or indemnify Quinn-L in the Dallas County suit. (R.

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court granted sanctions, ordering that all the admission requests be deemed admitted. (R. "A-8" Ex. 89)

[7] Assignments like this are not uncommon or improper. See, e.g., *Foremost County Mutual Ins. Co. v. Home Indemnity Co.*, 897 F.2d 754, 755 (5th Cir. 1990) (applying Texas law); *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 166-67 (Tex.Civ.App. – Austin 1975, writ ref'd n.r.e.).

[8] Two weeks later, the Investors, again as both assignees and judgment creditors, also filed a declaratory judgment action against Royal in Cameron County seeking a declaration of coverage for the damages awarded by the Dallas County judgment. (R. "A-5" Ex. 21)

[9] On January 3, 1990, Royal asked the district court to reopen the first declaratory action and declare Royal's obligations under the Investors' pleadings in the Dallas County suit, including the new mental anguish allegations. (R. "A-5" Exs. 9-10) Royal acknowledged that these allegations had not been part of the first declaratory action. (*Id.*) The court refused, stating that the first action was closed and that the coverage issues "may be litigated in the current state court litigation." (SJEx. "3-FF")

001) In its complaint Royal did not seek enforcement of the first declaratory judgment nor did it plead res judicata or collateral estoppel.[10] On August 15, 1990, Quinn-L filed its answer and on September 27, 1990, Royal joined all the Investors to this second declaratory action as indispensable parties.[11] (R. Vol. 10)

On October 29, 1990, Royal, for the first time, sought a TRO to prevent the Investors from prosecuting their state court actions. (R. 769) On October 31st, the district court enjoined Quinn-L and the Investors from attempting to impose liability on Royal in any forum based on the August 7, 1990 judgment in the Dallas County proceedings.[12] (R. 929) On November 30, 1990, the district court issued a preliminary injunction on the same basis, stating in a written opinion that the "relitigation" exception to the Anti-Injunction Act gave it the authority to enjoin the state court claims seeking coverage under the policies because the first declaratory judgment allegedly decided the mental anguish coverage issue in Royal's favor, even though that judgment declared nothing more than that mental anguish had not been pleaded in the federal liability suit. (R. 1439) The court then stated that the "in aid of jurisdiction" exception to the Act authorized it to enjoin the state court claims relating to Royal's post-declaratory judgment tortious

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[10] Although the court of appeals heavily relied on the premise that Royal originally brought the second declaratory action as an action to enforce the first declaratory judgment, that premise is contradicted by the pleadings filed by Royal as reflected in the record and the fact that the district court considered the first declaratory action closed and the coverage issues litigable in the state court action. See note 9.

[11] The following day, however, Royal filed a notice of dismissal as to Professional Investors Partnership II, an Investor who had partners who were citizens of the same states as some of the underwriters of Royal Lloyds of Texas. (R. 444)

[12] At the time the court issued the TRO, the state court in Cameron County was one week away from deciding the Investors' summary judgment, which could have been dispositive of the case. (R. 2889) Thus, the state court was poised to rule on the merits of the Investors' state law claims at the time the district court enjoined them from proceeding. Additionally, the state court had already conducted hearings, made rulings, and discovery was well underway.

conduct in conjunction with the Texas state court action because an injunction was necessary to ensure that the federal court decide the claims to the exclusion of the state court. (*Id.*)

The Investors appealed, and, during the pendency of the appeal, Royal moved for summary judgment seeking a declaration that the Investors' post-first declaratory judgment tort claims, which they had sought to prosecute in their pending state court suit, were invalid. (R. 1629) The Investors sought a stay of the summary judgment motion from both the district court and the court of appeals on the ground that the summary judgment could circumvent the interlocutory appeal. (R. 1695) Royal successfully opposed the stay requests arguing that any summary judgment issued by the district court would have to be vacated in the event the injunction was vacated on appeal. (R. 1803, 1819) Despite the Investors' written opposition, the district court granted summary judgment on December 20, 1991. (R. 2647) On May 5, 1992 the court of appeals decided the preliminary injunction appeal, affirming the "relitigation exception" injunction directed to the Investors' "direct claims," under the policies, but vacating the "in aid of jurisdiction" exception injunction directed to the post-first declaratory judgment torts aspect of the "assigned claims" as violative of the Anti-Injunction Act. (A-25)

Royal then asked the district court to enter a final declaratory judgment based on the new summary judgment and to enter a permanent injunction as to both the direct and assigned claims. (R. 2695) The Investors opposed Royal's request and moved to vacate the summary judgment on the ground that the court of appeals' holding that the Anti-Injunction Act prohibited the district court from enjoining the state court litigation over the post-first declaratory judgment tort claims also prohibited the district court from entering a declaratory judgment that would have precisely the same effect as an injunction. (R. 2806) The district court once again sided with Royal and, without a hearing, denied the Investors' motion and granted both the declaratory judgment and permanent injunction. (R. 2917, 2929) The Investors appealed these orders to the Fifth Circuit Court of Appeals, which affirmed them. The Petitioners now petition this Court for a writ of certiorari.

B. The Issues Presented for Review Were Raised Below

Quinn-L and the Investors questioned the district court's subjection matter jurisdiction on numerous occasions, including by two motions to dismiss for lack of subject matter jurisdiction. (R. 74, 119, 1182, 1695, 2924) They also raised the issue both on the appeal from the preliminary injunction and on the appeal from the permanent injunction. Furthermore, this Court may review the federal court's subject matter jurisdiction sua sponte.

Quinn-L and the Investors invoked the Anti-Injunction Act as a defense to Royal's injunction requests at every opportunity. (R. 891, 1182, 2137, 2806, 2941) They also raised the Act in an attempt to have the district court stay consideration of the summary judgment motion and as a basis for denying the summary judgment as well as the requested declaratory judgment. (R. 1695, 2156, 2137) Quinn-L and the Investors also asserted the Act as a basis for vacating the injunctions and judgments in their briefing before the court of appeals in both appeals.

REASONS FOR GRANTING THE WRIT

This case presents issues of fundamental importance to this Court in that it involves a gross intrusion on a state court's ability to adjudicate pending actions raising only state law issues by a federal court lacking either the jurisdiction or the authority to do so. By applying this Court's decision in *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990) to expand rather than to limit the scope of diversity jurisdiction and construing the diversity jurisdiction statute embracively rather than strictly, the court of appeals found diversity jurisdiction where there is none and has opened the door for the enlargement of diversity jurisdiction in future cases involving unincorporated associations.

To compound the usurpation of state judicial power, the court of appeals then impermissibly expanded one of the narrowly drawn exceptions to the Anti-Injunction Act by improperly extending the scope of an admittedly ambiguous and

extremely limited declaratory judgment to justify the granting of an anti-suit injunction and then affirming an injunction based on an issue that the parties did not litigate in the prior action. All this was done in contravention of this Court's dictates in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), and *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511 (1955). What was done below eviscerates the policy objectives of the Anti-Injunction Act – a statute that has been a bulwark of our federalism for more than two centuries – and cannot be allowed to stand. Additionally, the court of appeals' affirmance of the injunction violates the Due Process Clause of the United States Constitution by imposing a "relitigation" injunction on individuals who were not parties or in privity with parties to the prior judgment and who have never been heard on the issues decided in that proceeding.

The court of appeals' latest opinion shows how important it is for this Court to grant review of this case to provide guidance to the lower federal courts concerning the proper analysis to be applied in determining who is a member of an association for diversity jurisdiction purposes. According to the opinion below, the district courts are to ignore totally the role a party plays in the control of the association in deciding who are its members. This holding misapplies this Court's decision in *Carden* and ignores the role that the real party in interest test plays in the diversity analysis. It also represents a dangerously expansive holding that a party without whom an association could not exist and who is statutorily required to be a Texas citizen is to be ignored for diversity of citizenship purposes. Even more disturbing is that the district court exercised its improperly expanded subject matter jurisdiction to "reach down" to pending state court proceedings in order to deprive the Texas state court of its right to adjudicate issues of Texas substantive law. This improper exercise of jurisdiction cries out for proscription.

This case also presents a situation in which this Court must intervene if the Anti-Injunction Act is to have any real meaning in protecting the substance of our federalism. The

history of this litigation presents a glaring example of how an unrestrained federal district court can expand the statutory narrow exceptions so that they actually swallow the Act itself. Instead of constraining themselves to what was actually litigated and decided in the first declaratory action, the courts below exceeded the bounds of the "relitigation" exception by giving that extremely limited judgment an overly expansive "post-hoc" reading in order to enjoin issues that were not actually litigated by the parties in that first action. The district court also exceeded the bounds of the "in aid of jurisdiction" exception by enjoining state court adjudication of state law issues that could not have been litigated in the prior action because they had not yet arisen. When the court of appeals reversed that aspect of the injunction, the district court essentially changed the label on its prohibited injunction and reissued it. Knowing that it was not permitted to enjoin the state court proceedings directly in one step, this time the district court first entered a summary judgment declaring the tort claims pending before the state court to be insupportable under Texas law and then enforced its second declaratory judgment through a new anti-suit injunction, this time based on the relitigation exception. The end result is that the court of appeals now has validated an injunction that the same court earlier correctly had held violated the Anti-Injunction Act. In doing so, the court of appeals has created an unauthorized exception to the Act that threatens to encourage rather than discourage federal courts' meddling in state court proceedings through the use of declaratory judgment actions.

Additionally, the court of appeals' decision conflicts with decisions of other circuits, which limit the district courts' ability to enter a declaratory judgment after an action for affirmative relief has been commenced. See *Kidder, Peabody & Co. v. Maxus Energy*, 925 F.2d 556, 564 (2d Cir.), cert. denied, 111 S.Ct. 2829 (1991) (a district court should refrain from reaching out for issues through the vehicle of a declaratory judgment and "thereby depriving state courts of opportunities to develop and apply state law"); *Omaha Property & Cas. Ins. Co. v. Johnson*, 923 F.2d 446 (6th Cir.1991) (district court was without authority to entertain a declaratory judgment action

concerning state law issues in the face of a state court action seeking affirmative relief); *Tempco Elec. Heater Corp. v. Omega Eng'g Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) (district court could not continue to hear declaratory action after the institution of an action seeking affirmative relief). Here, the district court did just the opposite of what the other courts have held; it not only entered a declaratory judgment in the face of pending state court litigation on the same state issues, it used the declaratory action as a vehicle to stop the state court litigation from proceeding and thereby violated the Anti-Injunction Act.

To compound this gross intrusion on the judicial power of the Texas state courts, the court of appeals allowed the declaratory judgment directed to the state court litigation to stand despite the fact that the judgment was entered during the pendency of the Investors' appeal from the improper preliminary injunction. The court of appeals' decision in this regard is in conflict with *Hayes Industries, Inc. v. Caribbean Sales Associates, Inc.*, 387 F.2d 498, 499-500 (1st Cir. 1968) (a district court cannot deprive the appellant of the fruits of its appeal by ruling on the merits pending an appeal of an anti-suit injunction), and *Pyrodyne Corp. v. Pyrotronics, Corp.*, 847 F.2d 1398, 1403 (9th Cir. 1988) (the filing of an appeal concerning a preliminary injunction order deprived the district court of jurisdiction to rule on issues that were before the court of appeals). If this type of intermeddling is allowed to continue, all too soon the statute's very narrow exceptions will devour the Act itself.

This Court's guidance also is necessary to prevent persons who attempted, but were not allowed to become parties to an action from being bound by the resulting judgment. This case demonstrates the lengths to which some courts will go to reach what they believe to be the most expeditious result regardless of the personal rights at stake. Before nonparties can be bound by a judgment, they have the right to a full and fair hearing on the question of whether they were in privity with any party. The lower courts' refusal to allow the Investors that right is a dangerous precedent that must be corrected so that it is not

repeated by any other federal court that is tempted to pursue the path of least resistance.

The injunction against pending state court proceedings in this case violates both the letter and the spirit of the Anti-Injunction Act. In order to prevent the inevitable friction between state and federal courts that the Act was intended to avoid, in both this case and in future cases, this Court should review the opinion of the court of appeals and once again clearly delineate the Act's boundaries. But beyond that, this case demonstrates that it is imperative that this Court make clear not only what those boundaries are, but the rules that federal courts must follow to minimize federal judicial encroachment on legitimate state judicial power. This case demonstrates that the Act can be emasculated by (1) reading the prior federal action too broadly and giving lip service to contrary principles of construction; (2) using the declaratory judgment remedy despite a pending state action; (3) using the declaratory judgment to do the work of an injunction; (4) undermining the Anti-Injunction Act by proceeding to the merits while an appeal is pending; and (5) applying a declaratory judgment to as many people as possible by ignoring plain limitations on the principles of former adjudication. In sum, this Court should speak to critically important aspects of the methodology of applying the Anti-Injunction Act.

POINT I

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION TO ADJUDICATE THE POST-DECLARATORY JUDGMENT CLAIMS BECAUSE COMPLETE DIVERSITY OF CITIZENSHIP WAS LACKING DUE TO THE FACT THAT THE STATUTORILY MANDATED ATTORNEY-IN-FACT FOR ROYAL LLOYDS OF TEXAS, AN UNINCORPORATED LLOYDS PLAN INSURER, IS A TEXAS CITIZEN AND MUST BE CONSIDERED A MEMBER OF THE PLAN FOR DIVERSITY PURPOSES.

The decision below reads the diversity jurisdiction statute and this Court's precedent broadly so as to expand diversity jurisdiction, rather than strictly so as to limit it as both Congress and this Court intended. The courts now are told to

ignore the role a party plays in the operation and control of an unincorporated association in determining who are members of the association and instead are instructed to rely on semantics by focusing on the label imposed on certain members by the parties rather than on their actual roles. Review of this decision is necessary since the federal courts are in need of guidance in determining who should be considered members of an association for diversity purposes.

Royal had to establish that complete diversity of citizenship existed among the parties.[13] See *Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267 (1806). It is undisputed that Royal Lloyds, Inc., which is the statutorily mandated attorney-in-fact for Plaintiff Royal Lloyds of Texas, is a Texas citizen as are a number of Defendants. Therefore, the subject matter jurisdiction issue turns on whether Royal Lloyds, Inc.'s citizenship is to be taken into account for diversity purposes. If it is, complete diversity does not exist and the permanent injunction must be vacated.

This Court's precedents mandate consideration of Royal Lloyds, Inc.'s citizenship. Royal Lloyds of Texas is a "Lloyd's plan insurer," the formation and operation of which in Texas[14] is governed by the Texas Insurance Code. See Tex. Ins. Code Ann. §§ 18.01 et seq.[15] As an unincorporated association, the citizenship of all of its members must be considered for diversity of citizenship purposes. See *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990). The court of appeals concluded that only "underwriters" of the plan were members, citing *Carden* for the proposition that the level of control exercised by a party is irrelevant to the question of whether it is a member of the association. (A-8)

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[13] The court of appeals correctly held that the district court lacked ancillary or supplemental jurisdiction over the claims in question. (A-5-6)

[14] Lloyds associations are not peculiar to Texas; they exist in many other states as well. See generally 43 Am.Jr.2d *Insurance* § 77, pp. 156-57 (1982); 46A C.J.S. *Insurance* §§ 1711-16, pp. 697-700 (1993).

[15] The Code mandates the plan be controlled by an attorney-in-fact that must be a Texas citizen.

The court of appeals' reliance on *Carden* is misplaced and distorts this Court's holding in that case. Although it is true that in *Carden* this Court concluded that a member's lack of control over an association will not operate to render it a non-member, this Court did not hold the contrary is true – that a party's control is irrelevant to the determination of its inclusion in determining diversity jurisdiction. Indeed, this Court expressly has held that the control exercised by a party is relevant in determining whether that party is a real party in interest and, therefore, a party to be considered for diversity jurisdiction purposes. See *Navarro Savings Assoc. v. Lee*, 446 U.S. 458, 465-466 (1980); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (citizenship of joint stock corporation's president, who is the only one authorized to bring suit on behalf of the association, is relevant to diversity analysis). In holding that the trustees of a Massachusetts business trust are real parties in interest and, therefore, to be considered for diversity purposes, this Court in *Navarro* stressed:

> They have legal title; they manage the assets; they control the litigation. In short, they are the real parties to the controversy.

446 U.S. at 465. Certainly, if trustees of a business trust are considered real parties in interest in litigation concerning the trust, as *Navarro* holds, they are also members of the association for diversity purposes.

Applying that same analysis to a Lloyd's plan insurer leads to the conclusion that the attorney-in-fact is every much a real party in interest as was the trustee in *Navarro* and, therefore, a member of the Lloyds association. Under both the Texas Insurance Code and the Restated Articles of Agreement through which Royal Lloyds of Texas exists, the attorney-in-fact has legal title, controls the association's assets, and controls the litigation. Under Articles IV and V of the Restated Articles of Agreement, the underwriters contributed to the attorney-in-fact a fund of $325,000 to be used in the operation of the business as the attorney-in-fact saw fit. Article VI provides not only that the attorney-in-fact control the plan's business, but that it does so on behalf of **both** the

underwriters **and itself**.[16] Article XII makes clear that the attorney-in-fact is the only entity that had the authority to authorize its counsel to prosecute the declaratory actions on behalf of Royal Lloyds of Texas.

A Lloyd's association can issue insurance in Texas only by and through its Texas attorney-in-fact.[17] *Grace v. Rahlfs*, 508 S.W.2d 158, 161 (Tex.Civ.App. – El Paso 1974, writ ref'd n.r.e.). As the court held in *Grace*, the attorney-in-fact "for all practical purposes took the place of the insurers." *Id.* Indeed, the attorney-in-fact even has greater liability than the underwriters. See *Lloyd's of London v. Walker*, 716 S.W.2d 99, 102-03 (Tex.App. – Dallas 1986, writ ref'd n.r.e.) (the attorney-in-fact is liable to the claimant for the policy's full amount). Thus, not only is it an underwriter, which in and of itself makes it a member of the association for diversity purposes, it is in effect a "super underwriter."

It must be remembered that both declaratory actions were brought in the name of Royal Lloyds of Texas and not in the names of the individual underwriters. Because the attorney-in-fact is the only one who could bring this action in the association's name, the attorney-in-fact is the real party in interest and its citizenship must be considered for diversity purposes.[18]

Taking account of the attorney-in-fact's Texas citizenship is entirely consistent with the apparent purpose underlying diversity jurisdiction – to reduce the possibility of discrimination against a "foreign" litigant by state courts. See *Guaranty*

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[16] Because the attorney-in-fact operates the association's business on its own behalf and has personal liability for the policies it writes, it is much more than a mere agent or employee.

[17] The attorney-in-fact is an essential part of Lloyds associations in states other than Texas. See, e.g., Ill.Ann.Stat. ch. 215, § 5/86 (Smith-Hurd 1993); N.J.Stat.Ann. § 17:47-3 (West 1985); N.Y. Ins. Law § 107(29) (McKinney 1985); Okla.Stat.Ann. tit. 36, § 3002 (West 1990); Pa.Cons.Stat.Ann. tit. 40, § 933 (1992).

[18] Because the attorney-in-fact has a beneficial interest in the outcome of this litigation, it is not merely a nominal party. See *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 186-87 (1931); 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3606, at 418 (1984).

Trust Co. v. York, 326 U.S. 99, 111 (1945). Since the attorney-in-fact is the entity that controls Royal Lloyds of Texas and is the only party that could bring the present action on behalf of Royal Lloyds of Texas, and thus is the only member of the association visible in the state, it is logical to consider its citizenship. To look only to the "invisible" individuals to the exclusion of the "visible" member is inconsistent with the purposes behind diversity jurisdiction and the strict construction to be given the statute. See *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (policy of the diversity jurisdiction statute calls for its strict construction). Royal Lloyds, Inc. is an integral part of Royal Lloyds of Texas and, as such, must be considered a member for diversity purposes.[19] See generally *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35-36 (7th Cir. 1979), cert. denied, 444 U.S. 1098 (1980) (the diversity jurisdiction statute should be construed in light of its underlying purpose to prevent potential local prejudice against nonresidents); *Stifel v. Hopkins*, 477 F.2d 1116, 1125-26 (6th Cir. 1973) (diversity jurisdiction determination should emphasize physical facts of a party's situation tending to result in local prejudice). Inasmuch as Texas law requires the Lloyds plan insurer to be domiciled in Texas, it makes absolutely no sense to permit Royal Lloyds of Texas to invoke diversity jurisdiction in a suit against Texas citizens.

The court of appeals' decision to ignore the attorney-in-fact under the rationale that the control a party exercises is irrelevant leads to a broader application of diversity jurisdiction than that intended by Congress and by this Court in *Carden*. It also reveals a significant point of confusion arising over the interrelationship between *Carden* and *Navarro*. Only this Court can police the boundaries of federal subject matter jurisdiction to shore up the limitations set out in Article III of the Constitution and by Congress in the diversity statute. Additionally, the issue of situs of those exercising control

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[19] In essence, a Lloyds plan insurer is akin to a limited partnership. See *Couch on Insurance*, 2d (Rev. Ed.), § 74:273 (1983). As such, the attorney-in-fact is no different from a general partner and, as such, must be considered for diversity jurisdiction purposes.

over an association has in determining diversity jurisdiction is one likely to reoccur in the context of unincorporated associations.[20]

POINT II

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS THREATEN TO EMASCULATE THE ANTI-INJUNCTION ACT BY ENJOINING PENDING STATE COURT PROCEEDINGS ON THE BASIS OF AN ISSUE THAT THE PARTIES TO AN EXTREMELY LIMITED AND ADMITTEDLY AMBIGUOUS DECLARATORY JUDGMENT DID NOT ACTUALLY LITIGATE AND THAT WAS NOT DECIDED UNDER THE EXPRESS TERMS OF THE JUDGMENT.

The decision below demonstrates the ever present danger that district courts will continue to apply the narrow exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, expansively to interfere with pending state court litigation in violation of the Act's underlying policies. Thus, this Court must be vigilant in policing the lower courts' application of the Act and continue to set forth rules governing the Act's exceptions.

It is difficult to overstate the importance of the Anti-Injunction Act to our federalism. The Act, which has served us well for the past 200 years, is "an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970). As such, it stands as much more than a principle of comity; rather, it is a binding rule limiting the power of the federal courts. *Id.* at 286-87. Thus, the Act "is not a statute conveying a broad general

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[20] Other such associations include Lloyd's plans in other states (controlled by an attorney-in-fact), reciprocal insurance associations (controlled by an attorney-in-fact), limited liability partnerships (controlled by a managing partner), and various unincorporated churches (controlled by bishops, other clergy, or boards of directors).

policy for appropriate *ad hoc* application." *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511, 515-16 (1955).

As this Court has held, the bar against enjoining state proceedings is grounded in "the fundamental Constitutional independence of the States and their courts." *Atlantic Coast Line*, 398 U.S. at 288. Recently, this Court described the Act as:

> a necessary concomitant to the Framers' decision to authorize, the Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. **Prevention of frequent federal court intervention is important to make the dual system work effectively.**

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (emphasis added). The courts below seem to have ignored this Court's direction that "proceedings in state courts should normally be allowed to continue unimpaired by intervention of a lower federal court, with relief from error, if any, through the state appellate courts and ultimately this Court."[21] *Atlantic Coast Line*, 398 U.S. at 287.

Although the Act contains three exceptions,[22] they are strict and narrow; they cannot "be enlarged by loose statutory construction." *Chick Kam Choo*, 486 U.S. at 146. Indeed, this

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[21] As the record demonstrates, the district court preoccupied itself with the procedural course and merits of the state court proceedings instead of concentrating on a proper application of the Act itself. (TR. of 10-31-90, pp. 5, 17, 27). Indeed, the true root of the district court's concern appeared to be with the size of the Dallas County judgment. (*Id.* at p. 22). That judgment, however, was against Quinn-L and not Royal. Additionally, Royal would have had every opportunity to raise the same defenses in the Texas state courts that it raised in its summary judgment motions against the Investors in this action. Clearly, the courts below did not trust the Texas state courts.

[22] The three exceptions permit an injunction against a state court proceeding only when: (1) expressly authorized by Act of Congress; (2) necessary in aid of the federal court's jurisdiction; or (3) necessary to protect or effectuate the federal court's judgments – the so-called "relitigation" exception.

Court made clear their extremely limited application when it held:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of Section 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

Atlantic Coast Line, 398 U.S. at 298.

Resolving doubts against an anti-suit injunction is especially important in the context of the relitigation exception. The test for determining its application is whether the **precise** issue whose litigation is in question **actually** was litigated in the federal proceedings. See *Chick Kam Choo*, 486 U.S. at 148. This test is strictly and narrowly applied by determining from the record what the earlier federal judgment actually said; the court will not be permitted "to render a *post hoc* judgment as to what the order was **intended** to say." *Id.* (emphasis in original).

The courts below employed a dramatically opposite rule of construction and, by doing so, have violated the Act's sound principles and departed from this Court's precedents. When the relitigation exception is analyzed properly in the context of this case, it is clear that the Investors' state court suits against Royal in no way seek to relitigate or undermine the September 8, 1989 federal declaratory judgment. They are based on materially changed circumstances, different issues, and brought by persons who were not parties to the first declaratory action. Royal's first declaratory action merely sought a declaration that it had no duty to defend or indemnify Quinn-L for the Investors' then-present lost investment allegations in the federal liability suit. (R. "A-6" Ex. 16) The district court made its determination based on Royal's summary judgment motion. In their briefing, the parties disagreed as to, among other things, whether the Investors had pleaded mental anguish as damages. Royal claimed that mental

anguish had not been alleged and Quinn-L argued that it had. (R. "A-5" Ex. 4, pp. 7-8; "A-5" Ex. 3, p. 9)

The district court, agreeing with Royal, held that the "present allegations in the pending suits do not allege . . . 'personal injury' as defined by the policies." (R. "A-5" Ex. 7, p. 2) Since the umbrella insurance policy defines "personal injury" as, among other things, mental anguish, the court necessarily held that the then pending suits did not allege mental anguish. (R. 572) The court in its final judgment again found no allegations of mental anguish in the Investors' "pending" federal liability suit. (R. "A-5" Ex. 8) In short, the court's decision gave Royal exactly the declaration it had requested the court to award – but that applied only to the then pending federal liability action and to nothing else.

The Investors thereafter filed suit against Quinn-L in a Texas state court and the Investors did what the district court had held in the declaratory-action, at Royal's insistence, they had not done in the federal liability action: They alleged mental anguish and bodily injury caused by Quinn-L's negligence and gross negligence.[23] This new suit, with its new allegations, was not within the judgment in the first declaratory action since that judgment only covered Royal's duty to defend a prior suit that did not allege mental anguish or bodily injury. See *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983) (a complaint that does not initially create a duty to defend, may be amended so as to give rise to such a duty). Therefore, the first declaratory judgment, which by its terms only declared Royal's obligations with respect to the allegations in the superseded complaint in the dismissed federal liability action did not control the issue of whether

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[23] The new pleadings also added causes of action to those alleged against Quinn-L in the federal liability suit, including new allegations of general negligence, negligent breach of fiduciary duties, negligent misrepresentation, and negligent conspiracy. These new allegations were significant because negligence constitutes an "accident" or "occurrence" as a matter of law. See *Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 400 (Tex. 1967).

Royal's policies covered the new allegations in the Texas state court action.[24]

Any "lingering doubts" as to the scope of what actually was litigated in the first declaratory action is resolved by Royal's conduct with respect to it. See *Atlantic Coast Line*, 398 U.S. at 292. Royal's behavior shows that, until it sought the injunction below, it consistently acted for over one year as if the first declaratory action did not adjudicate whether negligently caused mental anguish is covered by the policies. On numerous occasions, Royal represented to both the district court and Quinn-L that the first declaratory judgment did not determine Royal's obligations to Quinn-L arising from the new allegations in the Dallas County action. (R. 004, 135; "A-5" Exs. 9, 10, 36, 43) If Royal actually believed the first action decided the issue, it would not have defended Quinn-L or filed the second declaratory action, which would be nothing more than a completely superfluous reaffirmation of the first declaratory action. Indeed, if Royal did anything, it would have sought only enforcement of the first declaration.

In violation of the Act, both the district court and the court of appeals ignored the basic principles of construing the scope of a declaratory judgment and Royal's pattern of behavior. In the Anti-Injunction Act context, the judgment must be clear about the issues actually litigated; doubts must be resolved against an injunction; and the parties' conduct is relevant. *Atlantic Coast Line*, 398 U.S. at 291, 298. At the very least, the wording of the first declaration, which clearly spoke only to the allegations in the pending federal liability action, and Royal's actions concerning it raise considerable doubt whether the coverage issues of mental anguish and

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[24] In the context of insurance coverage declaratory judgment actions involving pending litigation, the resulting declarations have a very limited, transitory utility. See, e.g., *Green v. Aetna Ins. Co.*, 349 F.2d 919, 926-27 (5th Cir. 1965) (recognizing that declaratory relief concerning an insurer's duty to indemnify can be problematic when based on the pleadings, which are subject to change). That being so, it would be especially improper in the anti-suit injunction context to enlarge a declaratory judgment *post hoc*, particularly when a state court can decide these critical state law issues.

accident were litigated. If Royal, the party who requested and drafted the judgment, did not believe it declared its duty to defend the new allegations, then the judgment clearly was ambiguous and, therefore, cannot support an anti-suit injunction.[25]

Thus, the court of appeals' opinion violates many of the protective restrictions this Court has announced to assure the viability of the Anti-Injunction Act. Instead of limiting the prior judgment to its express terms and resolving doubts against application of the relitigation exception, the courts below gave the judgment an expansive, "*post hoc*" reading and resolved **admitted** ambiguities in favor of the injunction. This violation of the Act not only impacts this case by inevitably creating friction between the Texas state courts and the federal courts,[26] it also represents a significant breech in the Act's protective shield that threatens to widen should other courts, both within and without the Fifth Circuit, follow the court of appeals' lead. The Anti-Injunction Act is too central an element in our federalism to tolerate this potential for mischief. Only review by this Court can seal the fissure created below.

POINT III

THE DECLARATORY JUDGMENT AND CORRESPONDING INJUNCTION AGAINST PENDING STATE COURT PROCEEDINGS ENTERED UNDER THE GUISE OF THE "RELITIGATION" EXCEPTION VIOLATE THE ANTI-INJUNCTION ACT BECAUSE THEY HAVE THE SAME EFFECT OF ENJOINING PROPERLY

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[25] The district court recognized the ambiguous nature of its first declaratory judgment when it excused Royal's repeated representations concerning the judgment's scope as simply being a mistaken interpretation of the judgment and when it stated in its order refusing to reopen the first declaratory action that the insurance coverage issues could be litigated in state court. (R. 1072; SJEx "3-FF")

[26] This court has recognized that an injunction against pending state court proceedings will **inevitably** lead to friction between the state and federal courts. See *Chick Kam Choo*, 486 U.S. at 146, quoting *Vendo Co. v. Lektro-Vend Corp.*, 438 U.S. 623, 630-31 (1977) (plurality opinion).

INSTITUTED STATE COURT ACTION AS DID THE PRIOR "IN AID OF JURISDICTION" INJUNCTION, WHICH THE COURT OF APPEALS PREVIOUSLY CORRECTLY VACATED AS VIOLATING THE ACT, AND THIS COURT SHOULD GRANT REVIEW AND REJECT THIS DEVICE FOR CIRCUMVENTING THE ACT.

The decision below permits a district court to entertain a declaratory judgment directed at pending state court litigation when the declaratory judgment action is being used as a vehicle for creating the threshold judgment required by the "relitigation" exception. This practice must be proscribed by this Court if the Act is to be maintained as the pillar of federalism that the Founders intended and the precedents of this Court declare it to be instead of a mere formality to be circumvented through clever procedural maneuvering.

The key to understanding this issue as it arises in the present action is to recall that the Investors brought two different classes of claims against Royal in the Cameron County state court suit. The first class of claims ("contract claims") are those dependent on a showing that the damages awarded in the Dallas County state court judgment were covered, at least in part, by the Royal insurance policies. These claims include breach of contract and indemnity under the policies. The second class of claims ("tort claims") are those that arise from Royal's conduct after the entry of the first declaratory judgment and are not dependent on whether the damages awarded in the state court judgment are covered by the insurance policies. These claims include, among others, negligence, waiver, and estoppel.

The district court's preliminary injunction enjoined the contract claims under the "relitigation" exception to the Act and enjoined the tort claims under the "in aid of jurisdiction" exception. The court of appeals ultimately held that the injunction directed to the tort claims violated the Act because the "in aid of jurisdiction" exception did not apply to claims arising after the federal court had concluded the first declaratory judgment action. During the pendency of the Investors'

interlocutory appeal from the preliminary injunction, however, the district court granted Royal a summary judgment declaring the Investors' tort claims, which were not properly before it and already pending in the state court proceedings, unsustainable as a matter of law.[27] The district court then issued a permanent injunction using both the previously issued one involving Royal's duty to defend in the dismissed federal liability action and the new declaratory judgment directed to the pending state court litigation as the basis for invoking the relitigation exception.

The court of appeals affirmed the permanent injunction, thus allowing the district court to enjoin the same state court proceedings on the after-arising tort claims through a subsequently instituted federal declaratory action that the court of appeals earlier had held the Anti-Injunction Act prohibited the court from enjoining directly. In so holding, the court of appeals treated the prohibition against intruding upon pending state court proceedings by way of a declaratory judgment merely as a matter of abstention or comity. (A-16) But this holding flies in the face of this Court's precedents construing legislation indistinguishable from the Anti-Injunction Act.

In *California v. Grace Brethren Church*, 457 U.S. 393 (1982) this Court held that the Tax Injunction Act, 28 U.S.C. § 1341[28] prohibits a district court from issuing a declaratory judgment finding state tax laws unconstitutional. This Court stated:

> [B]ecause there is little practical difference between injunctive and declaratory relief, we would be hard

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[27] The Investors asked both the district court and the court of appeals to stay consideration of the summary judgment motion pending the interlocutory appeal. Royal, however, successfully opposed the stay motions, arguing that no harm could be done by proceeding with the summary judgment motion because the Anti-Injunction Act would require vacation of the summary judgment should the preliminary injunction be reversed. Royal conveniently and shamelessly retreated from that position after the court of appeals reversed the preliminary injunction.

[28] Section 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

> pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court while permitting them to seek another thereby defeating the principal purpose of the Tax Injunction Act. . . . "

Id. at 408. Thus, this court has recognized that declaratory relief is the functional equivalent of injunctive relief. See also *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971) (if an injunction against a pending state court criminal prosecution would be improper, declaratory relief also should be denied). This Court should now grant review to make clear that the principal enunciated in *Grace Brethren Church* applies equally to the Anti-Injunction Act. When a declaratory judgment would have the same practical effect on a pending state court action as would an injunction, declaratory relief is improper if the Anti-Injunction Act would prohibit an injunction against the state court action.

Curiously, the court of appeals sitting en banc in *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988), cert. denied, 490 U.S. 1035 (1989) properly held that the Act applied to declaratory judgments as well as injunctions; in this case the same court seems to have lost its way. Instead of examining the declaratory judgment in the context of the prohibition of the Anti-Injunction Act, the court of appeals chose to examine it in the context of principles of comity. In so doing, the court of appeals affirmed an injunction entered in violation of the Anti-Injunction Act and created a sleight-of-hand technique that can be used by other courts to circumvent the Act's important objectives unless this Court makes clear that the practice employed below is impermissible. The Anti-Injunction Act is designed to minimize, not maximize, intrusion on pending state court litigation, particularly when that litigation is based on state law, which means that the bootstrapping use of a declaratory action practiced below must be excised from the litigator's bag of tricks.

Furthermore, by validating the use of a declaratory action to circumvent the Anti-Injunction Act, the decision below is

in conflict with the decisions of at least two other courts of appeals, which have held that a federal declaratory action should give way to proceedings in which affirmative relief is sought. See *Omaha Property & Cas. Ins. Co. v. Johnson*, 923 F.2d 446 (6th Cir. 1991) (district court was without authority to entertain a declaratory judgment action concerning state law issues in the face of a state court action seeking affirmative relief); *Tempco Elec. Heater Corp. v. Omega Eng'g Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) (district court could not continue to hear declaratory action after the institution of an action seeking affirmative relief). Thus, other circuits have recognized that the utility of a declaratory action is greatly outweighed by its potential to disrupt pending litigation once an action is commenced seeking affirmative relief, especially when the affirmative claim involves state law issues pending before a state court. In this case, however, the court of appeals allowed a declaratory action to be used solely as a vehicle to preempt pending state court proceedings seeking affirmative relief under state law. This Court's direction is needed by the lower courts to resolve this conflict.

Both the district court and the court of appeals found that Royal brought this second action as a suit to enforce the first declaratory judgment.[29] (A-12) Ironically, even if this is true, which it is not, once these courts concluded that the first declaratory judgment decided all coverage issues, nothing was left for the district court to declare by way of a second declaratory judgment. Indeed, the court of appeals recognized that the district court was not required to adjudicate the issues raised in Royal's summary judgment motion in order to rule on the permanent injunction request when it held that the court lacked ancillary jurisdiction over the post-first declaratory judgment tort claims. In light of this, there was nothing before the district court with respect to the "affirmative defenses." There was absolutely no legitimate reason why the district court should have proceeded to adjudicate those issues

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[29] As shown above, this simply is not accurate; Royal did not seek enforcement of the first declaratory judgment until more than seven months after bringing this action. See note 10.

by way of declaratory judgment since they were already pending before a Texas state court in an action for affirmative relief. The only conceivable reason it did so was an impermissible one – to prevent the state court from doing so. The district court's preemptive action violated the absolute prohibition of the Anti-Injunction Act and cannot be justified under some alleged notion of comity. See *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Kidder, Peabody & Co. v. Maxus Energy*, 925 F.2d 556, 564 (2d Cir.), cert. denied, 111 S.Ct. 2829 (1991).

In *Kidder, Peabody & Co.*, the district court entered a declaratory judgment relating to issues pending in a Texas state court action for affirmative relief and then issued an anti-suit injunction prohibiting litigation of the state court action based on the declaratory judgment. The Second Circuit reversed the declaratory judgment and the injunction, holding that the district court should have refrained from reaching out for issues "thereby depriving state courts of opportunities to develop and apply state law." 925 F.2d at 564. The Fifth Circuit's decision in this case stands in sharp conflict with the Second Circuit's decision.

The district court's aggressiveness in this case is particularly offensive since it raced forward to enter the declaratory judgment while the state court proceedings were under an injunction subsequently determined to violate the Act. It is also incompatible with precedent in the First Circuit. In *Hayes Industries, Inc. v. Caribbean Sales Associates, Inc.*, 387 F.2d 498 (1st Cir. 1968), the district court had issued an injunction precluding the defendant from pursuing a state court action purportedly under the "in aid of jurisdiction" exception. *Id.* at 501. While the defendant's interlocutory appeal of the injunction was pending before the First Circuit Court of Appeals, the federal district court set the merits of the case for trial. *Id.* at 499. In order to protect its jurisdiction over the interlocutory appeal, the First Circuit entered an order vacating the lower court's order setting the case for trial. *Id.* at 500. In doing so the court recognized that one of the issues before it on appeal was whether both the federal and state courts should be allowed to proceed simultaneously

and that the lower court would effectively render that issue moot should it proceed with the merits of the case while the injunction was in place. *Id.* at 499-500.

The Investors complained at every possible juncture of the impropriety of hearing the summary judgment during the pendency of an appeal from a blatantly improper injunction, but were still denied the fruits of their interlocutory appeal."[30] This Court should resolve the important methodological conflict between the Fifth and the First Circuits by declaring the importance of preserving the viability of an Anti-Injunction Act challenge pending appeal.

POINT IV

THE ANTI-SUIT INJUNCTION AGAINST THE INVESTORS, WHO POSSESSED CLAIMS AGAINST ROYAL INDEPENDENT OF THE CONTRACT CLAIMS OBTAINED FROM QUINN-L BY ASSIGNMENT, VIOLATES THEIR DUE PROCESS RIGHTS BECAUSE THEY WERE NOT PARTIES TO THE PRIOR JUDGMENT AND WERE NOT AFFORDED ANY MEANINGFUL HEARING ON THE ISSUE OF WHETHER THEY WERE IN PRIVITY WITH QUINN-L.

The court of appeals compounded its other violations of the Anti-Injunction Act by affirming the injunction preventing the Investors from asserting their "direct claims" in state court in spite of the fact that they were not parties to the first declaratory judgment. The Investors, who have a direct cause of action against Royal as judgment creditors and were not parties to the first declaratory action,[31] have a due process

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[30] Indeed, the district court probably lacked jurisdiction to enter the summary judgment while the Investors' interlocutory appeal was pending since the summary judgment had the potential to and essentially rendered moot the "in aid of jurisdiction" aspect of the appeal. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Pyrodyne Corp v. Pyrotronics Corp.*, 847 F.2d 1398, 1403 (9th Cir. 1988).

[31] At Royal's request, the district court twice denied the Investors' attempts to join the first declaratory action, making it somewhat ironic that it now presses the claim that the Investors are bound by that proceeding.

right to their own day in court to litigate all coverage issues. See *Martin v. Wilks*, 490 U.S. 755, 761 (1989). The prior judgment cannot have any preclusive effect on the non-party Investors absent privity with Quinn-L. *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987). See also *Burton v. State Farm Mutual Automobile Ins. Co.*, 335 F.2d 317, 325 (5th Cir. 1964) (declaratory judgment not binding on judgment creditors who were not joined); *Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 774 (Tex. 1983) (prior declaratory judgment against insured could not operate as collateral estoppel as to non-joined claimants who have a direct right of action).

In granting summary judgment, the district court did not pass on the merits of Royal's argument that the Investors were virtually represented by Quinn-L in the first declaratory judgment. Indeed, the court refused to consider the Investors' evidence on the privity issue. (R. 2923) Rather, the court merely stated that it already had decided that issue in conjunction with the preliminary injunction. (R. 1068) Findings made in the context of a preliminary injunction, however, do not constitute final findings and are not binding at the trial on the merits. See *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). This is axiomatic because preliminary injunctions typically are heard on an expedited basis and do not usually afford a litigant a constitutionally sufficient opportunity to be heard. *Id.* Therefore, litigants are entitled to a full and fair hearing on the merits of the issues before the issuance of a permanent injunction.

In affirming the district court's "finding," the court of appeals simply concluded that the district court properly granted summary judgment on the issue. Thus, the court of appeals ignored both the summary judgment evidence, which raises a factual dispute on the privity issue, and the fact that the district court **never addressed the issue on the merits** – its preliminary injunction determination is not a surrogate for the Investors' constitutional right to a day in court on the privity question. *Id.* If this Court does not review the propriety of cavalierly treating the Investors as bound by the first declaratory judgment, they will have been deprived of their

due process rights in two respects – (1) they will have been enjoined based on a judgment to which they were not parties; and (2) they will have been held to be in privity without a full hearing on the merits of that fact issue.

Since the injunction against the Investors' "direct claims" was issued without an opportunity to be heard on whether they were properly bound by the first declaratory judgment action, the injunction violates their due process rights. See *Martin*, 490 U.S. at 761. It is important to correct this blatant denial of the Investors' fundamental constitutional rights by granting review to enforce the principles enunciated in *Martin*. But beyond that, what happened below makes it clear that this Court should elaborate on its decision in *Martin* to help the lower courts understand the type of process that must be accorded a litigant before he or she can be bound on an issue that arises in the context of a preliminary ruling and then resurfaces in the context of a decision on the merits or with regard to a permanent relief – a phenomenon that occurs in a wide variety of contexts other than that presented in this case.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 3, 1994

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1808

ROYAL INSURANCE COMPANY OF AMERICA
and
ROYAL LLOYDS OF TEXAS,

Plaintiffs-Appellees,

VERSUS

QUINN-L CAPITAL CORPORATION, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Sept. 27, 1993)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The facts of this case are set forth in *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992) ("*Royal I*"). Following remand in *Royal I*, the district court entered final judgment against defendant *Quinn-L Capital Corp.* ("Quinn-L"), granting summary judgment in favor of plaintiffs Royal Insurance Company of America and Royal Lloyds of Texas (collectively, "Royal") and entering a permanent injunction that barred Quinn-L and the defendant investors from relitigating any of the claims or

issues decided in either this declaratory judgment action or the first declaratory judgment action.

I.

Quinn-L argues that the federal courts do not have jurisdiction for three reasons. First, Quinn-L contends that the district court did not have ancillary jurisdiction over the affirmative defenses of waiver, estoppel, and negligence. Second, Quinn-L contends that no diversity jurisdiction exists. Third, Quinn-L asserts that the district court had no jurisdiction to grant summary judgment while an appeal was pending before this court.

A.

In *Royal I*, we recognized that the district court had ancillary jurisdiction to issue an anti-suit injunction to protect or effectuate its prior judgments. 960 F.2d at 1292. Quinn-L argues that the district court lacked jurisdiction to grant summary judgment on the waiver, estoppel, and negligence claims because those claims are outside the scope of the first declaratory judgment action. Royal contends that we held in the first action that the district court had ancillary jurisdiction over the entire controversy and that this holding is law of the case.

Before addressing the merits of the jurisdictional argument, we must decide whether law of the case principles apply to appeals of preliminary injunctions. We decide that issue here because Royal relies upon the law of the case doctrine in addressing numerous points of

error raised by Quinn-L. Quinn-L argues that the doctrine has no application in preliminary injunction proceedings.

The law of the case doctrine was developed to "maintain consistency and avoid [needless] reconsideration of matters once decided during the course of a single continuing lawsuit." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478, at 788 (1981). "These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." *Id.* Under this doctrine, we will follow a prior decision of this court without reexamination in a subsequent appeal unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice." *North Miss. Communications v. Jones*, 951 F.2d 652, 656 (5th Cir.), *cert. denied*, 113 S. Ct. 184 (1992). The doctrine extends to those issues "decided by necessary implication as well as those decided explicitly." *Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1098 (5th Cir. 1983) (citation, quotation marks, and emphasis omitted).

We disagree with Quinn-L's suggestion that law of the case principles have no application to an interlocutory appeal of the granting of a preliminary injunction. As in any other interlocutory appeal, our decision constitutes law of the case. 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[4.___7], at II-37 (2d ed. 1993). Obviously, the doctrine extends only to matters actually decided. *Id.* at II-37 to II-38. As to decisions of law, the interlocutory appeal will establish law of the case.

As to factual determinations, however, an interlocutory appeal of a preliminary injunction often will not establish law of the case. To obtain a preliminary injunction, the movant need only show a substantial likelihood of success on the merits. We review a district court's findings of fact supporting the grant of a preliminary injunction for clear error. *Royal I*, 960 F.2d at 1297. Because the standard of review for factual determinations on direct appeal is higher than the standard applied during an interlocutory appeal of a preliminary injunction, the interlocutory appeal normally will not establish law of the case on factual matters.

Contrary to Quinn-L's suggestion, however, the reason this result does not obtain is not because law of the case principles are inapplicable. Rather, the lesser standard of review applied during an appeal of a preliminary injunction necessarily means that the factual issues differ from those on direct appeal. Such a difference often will result only from the higher standard of review applied during the direct appeal.

With this background in mind, we now address Royal's contentions that we previously held that the district court had ancillary jurisdiction over the entire controversy and that this alleged holding is law of the case. In *Royal I*, we held that the district court has "ancillary jurisdiction over the present controversy." 960 F.2d at 1292. Read in context, this means that we held only that the district court had ancillary jurisdiction to issue an anti-suit injunction under the "protect or effectuate its judgments" exception to the Anti-Injunction Act (the "Act"), 28 U.S.C. § 2283 (1988). 960 F.2d at 1299. We also held that the district court should have limited the scope

of that injunction to exclude the claims that arose after the first declaratory judgment action. *Id.*

In other words, we held that the district court had ancillary jurisdiction to issue an injunction but that the Act bars a portion of the injunction. We did not have to decide, and did not decide, the jurisdictional issue as to the claims of waiver, estoppel, and negligence, as Quinn-L obtained a reversal on the merits as to those claims.[1] Here, the jurisdictional issue is squarely presented, and we must decide it.

We conclude that the district court did not have ancillary jurisdiction to address the waiver, estoppel, and negligence claims. As noted above, the district court has ancillary jurisdiction[2] to protect or effectuate its judgments. This jurisdiction extends no further than necessary to achieve that purpose. But "[w]hile . . . the . . . Act is not a grant of jurisdiction, no independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court. The jurisdiction that the federal court had when it entered its original

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[1] It is uncertain whether it was proper for us to pretermit the jurisdictional issue in *Royal I* while reversing the preliminary injunction as to the waiver estoppel and negligence claims. Because of our holding today on diversity jurisdiction, we need not address this.

[2] What was referred to formerly as "ancillary jurisdiction" is now included within the category of "supplemental jurisdiction." *See* Pub. L. No. 101-650, 104 Stat. 5113 (codified at 28 U.S.C.A. § 1367 (West Supp. 1993)). The amendment applies only to actions filed on or after December 1, 1990, so it is inapplicable to the instant case.

judgment is enough to support its issuance of an injunction." *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft)*, 730 F.2d 367, 374 (5th Cir. 1984) (citing 17 WRIGHT ET AL., *supra*, § 4276, at 345 (1978)).

In *Mooney*, we noted that where a bankruptcy court seeks to enjoin claims that were not encompassed in a prior judgment, no ancillary jurisdiction exists. 730 F.2d at 374. Under *Mooney*, the district court must have an independent basis for jurisdiction over Quinn-L's waiver, estoppel, and negligence claims, as those claims were not raised in the prior declaratory judgment proceeding and are not barred by that proceeding under res judicata principles.

Thus, we agree with Quinn-L that ancillary jurisdiction extends no further than the scope of the first judgment. The basis for allowing the federal courts to exercise ancillary jurisdiction in issuing anti-suit injunctions is to allow them to protect their prior judgments; where new claims are involved, the policy basis for ancillary jurisdiction disappears. We therefore conclude that ancillary jurisdiction to issue anti-suit injunctions normally will not allow a federal court to exercise jurisdiction over new claims not addressed in the judgment the court is seeking to protect.[3]

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[3] Of course, if the first action bars the new claims because of res judicata principles, ancillary jurisdiction exists as to those claims.

B.

Next, we must decide whether diversity jurisdiction exists in this case. Royal is an unincorporated association that sells insurance under a so-called "Lloyd's plan." For purposes of ascertaining whether the federal courts have diversity jurisdiction, an unincorporated association is considered to have the citizenship of its members. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990). This case turns on the question of who constitutes a "member" of a Lloyd's plan insurance association. None of the underwriters is a citizen of Texas, while at least one attorney in fact is a resident.

A Lloyd's plan insurer consists of a group of underwriters who join together to issue insurance through an attorney in fact or other representative. TEX. INS. CODE ANN. §§ 18.01-02 (West 1981). Ordinarily, such insurers provide insurance for risks for which American insurance companies otherwise would not issue policies. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 2.1(a)(1) (West 1988) (practitioner's ed.). Under the Lloyd's plan, the insured typically obtains insurance from one or more members of the Lloyd's group; each member accepts responsibility for a portion of the risk, and liability among the members is several but not joint. *Jones v. Hollywood Style Shop*, 62 S.W.2d 167, 167 (Tex. Civ. App. ___ San Antonio 1933, no writ); KEETON & WIDISS, *supra*, § 2.1(a)(1). In other words, the individual member is responsible only for the portion of the risk that it chooses to insure.

The Lloyd's group underwriters appoint an attorney in fact to act for them under a power of attorney. TEX. INS.

CODE ANN. § 18.01-1 (West 1981). The attorney in fact has the power to issue policies of insurance, "authorized by and acting for such underwriters. . . . " *Id.* The attorney in fact is "in effect the chief executive and managing agent of the enterprise. . . . " *Grace v. Rahlfs*, 508 S.W.2d 158, 161 (Tex. Civ. App. ___ El Paso 1974, writ ref. n.r.e.).

Quinn-L contends that the attorney in fact is akin to a general partner of a general partnership and that the underwriters are akin to limited partners. We do not find the analogy relevant to our inquiry, as the degree of control exercised by an individual over an entity is irrelevant to the question of whether he is a member of the entity. *Carden*, 494 U.S. at 192.

Analogies to other types of state-created entities likewise are not especially helpful. The only relevant inquiry is the identification of the members of *this* particular entity. Normally, we should examine an entity's definition of "member." Here, such an inquiry is unnecessary, as the relationship of the attorney in fact to a Lloyd's group is described by statute.

We agree with Royal that the attorney in fact is not a member of a Lloyd's group insurance association; only underwriters are members of the organization. As noted above, the attorney in fact acts as an *agent* for the Lloyd's group. *Grace*, 508 S.W.2d at 161. Under Texas law, the attorney in fact must be authorized by the underwriters to execute insurance polices and *acts for* those underwriters by so doing. TEX. INS. CODE ANN. § 18.01-1 (West 1981). Moreover, the attorney acts under powers of attorney from the underwriters, *id.*, who also dictate, in the articles of agreement, where the principal office of all

attorneys will be, *id.* § 18.02. Thus, for purposes of determining whether diversity jurisdiction exists, we conclude that the members of a Lloyd's group are the underwriters alone.[4]

Because attorneys in fact are not members of Lloyd's plan insurance associations, we look only to the citizenship of the underwriters to determine whether diversity jurisdiction exists. Here, because none of the underwriters is a Texas citizen, complete diversity exists.

C.

Finally, we must consider Quinn-L's contention that the district court lacked jurisdiction to grant summary judgment while the interlocutory appeal in *Royal I* was pending. A district court loses jurisdiction over all matters validly before a court of appeals. *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990). The district court does not have the power to "alter the status of the case as it rests before the Court of Appeals." *Id.* Quinn-L argues that the summary judgment determined a matter within our jurisdiction.

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[4] Our conclusion is not altered by the fact that Texas law requires that the Lloyd's group appoint a resident of Texas as an attorney in fact if it wishes to issue insurance policies in Texas. *See* TEX. INS. CODE ANN. § 18.02 (West 1981). Texas could have required one or more underwriters to be a resident of the state but chose only to require the attorney in fact to be a resident. Texas's election to require an association to employ an agent within the state to conduct the association's business does not make the agent any more or less an agent.

This case does not fall within the scope of *Dayton*, a case in which the district court made a ruling that mooted an interlocutory appeal. In other words, the district court's action interfered with our jurisdiction to decide the issues before us. Here, the district court's continuing jurisdiction during the pending interlocutory appeal did not interfere with our ability to decide the issues presented in *Royal I*. Accordingly, the district court had jurisdiction to enter summary judgment.

II.

Quinn-L argues that the declaratory judgment and permanent injunction must be vacated because they violate the Act, which provides as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1988). The Act is "an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of [the] three specifically defined exceptions." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970). The Court also has warned that "the exceptions should not be enlarged by loose statutory construction." *Id.* at 287.

Here, the district court rendered a declaratory judgment on the waiver, negligence, and estoppel claims and enjoined defendants from proceeding therewith in state court. On its face, then, this judgment falls squarely within the "protect or effectuate its judgments" exception

to the Act. We have stated, however, that "[i]f an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 [5th Cir. 1988] (en banc) (citation and quotation marks omitted), *cert. denied*, 490 U.S. 1035 (1989). Quinn-L argues that because we held in *Royal I* that the Act barred the preliminary injunction as to the waiver, estoppel, and negligence claims, *Jackson* necessarily bars the declaratory judgment and permanent injunction on those claims.

In *Jackson*, the plaintiff sought relief under the Longshore and Harbor Workers' Compensation Act (LHWCA) using the normal administrative process. Before that process was complete, he sued his employer's LHWCA insurer in state court, alleging, *inter alia*, deceptive trade practices, fraud, bad faith, and intentional infliction of emotional distress. The insurer filed a plea in bar asserting LHWCA preemption. The state court denied the petition, and extensive discovery was conducted. Later, the insurer filed a declaratory judgment action in federal court seeking an injunction against prosecution of the state court suit.

The district court granted the injunction on the basis of the "protect or effectuate its judgments" exception to the Act. The panel reversed and barred the grant of injunctive relief but allowed the declaratory judgment to stand. *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987). The en banc court held that the declaratory judgment was invalid as well, because it was "plain that the *only* purpose and effect of TEIA's federal suit was to defeat Jackson's state suit against it and to, in effect,

overrule the state trial court's denial of TEIA's plea in bar." 862 F.2d at 491. Expressing our concern over the apparent attempt to interfere with a state proceeding, we observed that "[t]o allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand." *Id.*

As we noted above, we stated in *Jackson* that if "an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." 862 F.2d at 506. Our inquiry here then depends upon the resolution of two issues. First, we must decide whether the Act would prevent the federal courts from issuing an injunction under the facts of this case. If it would not, then *Jackson* does not apply. Second, if an injunction would be barred, we must decide whether *Jackson* is distinguishable.

To decide whether the Act would bar an injunction on the waiver, estoppel, and negligence claims, we must address a question that is *res nova* in this circuit. Quinn-L injected these claims into the federal proceedings *before* it had filed any state court actions on these claims. In other words, Royal filed a declaratory judgment action seeking an anti-suit injunction prior to the commencement of any state proceedings. Before a state court suit is filed, the Act has no application, and a federal court may enjoin parties from ever filing suit in state court. *Jackson*, 862 F.2d at 507 (citing 17 WRIGHT ET AL., *supra*, § 4222, at 506-07 (1988)).

A circuit split exists on the question of whether the Act has any application where the injunction is sought before a state suit has been filed but is not issued until after a state suit was filed. Three circuits have adopted the rule that the Act does not apply where the federal suit is filed first. *See Barancik v. Investors Funding Corp.*, 489 F.2d 933, 937 (7th Cir. 1973); *National City Lines v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988). Two circuits, on the other hand, have held that the Act should be applied to the case as it stands, regardless of the order in which the actions were filed. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979); *see also Standard Microsystems Corp. v. Texas Instruments*, 916 F.2d 58, 61-62 (2d Cir. 1990) (disapproving of the reasoning in *Barancik*)).

The leading case holding that the Act does not apply when the federal suit is filed first is *Barancik*, in which the court reasoned that the Act does not apply because the applicability of the Act should be determined at the time the federal court's injunctive powers are invoked. 489 F.2d at 937. The court was concerned that otherwise a litigant could defeat a well-founded motion for an anti-suit injunction by filing a suit in state court. *Id.* The thrust of this reasoning is weakened, however, by the fact that a federal district court often issues a temporary restraining order (TRO) against filing a state court suit while it is considering a motion for a preliminary injunction seeking such relief. Such an action goes a long way to avoid the danger raised by the *Barancik* court.

The *Barancik* court felt that using TRO's would encourage the liberal granting of the kind of protective

orders that the statute was designed to prevent. We also disagree with this analysis, which assumes the district court will decide the issue wrongly and that granting a TRO will prejudice the decision on the merits. Such logic proves too much, as no TRO would be justified under this reasoning. Although the issuance of a TRO should not be automatic and is subject to, *inter alia*, the requirements of FED. R. CIV. P. 65(b),[5] the TRO is a useful tool where appropriate.

The *Barancik* court, moreover, held that the Act *does not apply* where the federal suit is filed first. In this class of cases, then, *Barancik* eviscerates the statutory bar against antisuit injunctions. The *Barancik* court also expressed concern that the court might have to take action without notice to the opposing party. We find this

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[5] Rule 65(b) reads in relevant part as follows:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice. . . .

reasoning to be questionable as well, as it assumes that district courts will ignore the requirements of rule 65(b).

We subscribe to what we think is the better view – that the Act applies regardless of when the federal and state suits were filed. The plain language of the statute contains no exception for a situation in which the federal suit was filed first. As the *Roth* court notes, 583 F.2d at 533, the Supreme Court has held that the statute provides an absolute prohibition on injunctions unless one of the three exceptions applies.

The Court repeatedly has emphasized that those exceptions are exclusive and that federal courts may not craft new ones. Any doubts should be resolved in favor of denying the injunction. *Roth*, 583 F.2d at 533 (citing *Atlantic Coast Line R.R.*, 398 U.S. at 286-87). Given the Court's consistently narrow interpretation of the Act, the presumption in favor of denying an injunction, and the absence of language in the statute suggesting that its application depends upon the time of filing of the state suit, we think Roth provides the better analysis. We conclude, therefore, that the Act applies whenever a state suit is pending, regardless of when it was filed.

Because the Act applies even when the federal suit is filed first, we now must address Quinn-L's contention that our holding in *Jackson* mandates reversal here. Royal argues that because the federal suit was filed first in this case, *Jackson* is distinguishable and hence is not controlling here.[6] To resolve this question, we return to policy concerns underlying our decision in *Jackson*.

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[6] We reject Quinn-L's suggestion that Royal is judicially estopped from claiming that *Jackson* does not apply to the facts

At oral argument, the parties characterized *Jackson* as a new type of abstention. We agree with this characterization, as no language in the Act or the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1982), specifically commands the result in *Jackson*.[7] As we recently recognized, our decision in *Jackson* was based upon principles of federalism and comity. *Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n*, 996 F.2d 774, 776 (5th Cir. 1993).[8]

In *Jackson*, the federal suit offended principles of comity and federalism because the plaintiff sought an overruling of a state court decision on LHWCA preemption. 862 F.2d at 505. Here, Royal has not attempted to interfere with the state courts. Instead, it sued to enforce a prior federal judgment, and Quinn-L injected new state claims into the federal action. Royal sought relief in federal court nearly six months before the state actions against Royal were filed. Moreover, significant proceedings took place during that time, including the filing of Royal's original and amended complaints, the filing of Quinn-L's answer, and the district court's consideration

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of this case. Royal merely offered a legal *opinion* regarding *Jackson's* application. As Royal properly argues, a statement of opinion on the law does not create a judicial estoppel. *Sturm v. Boker*, 150 U.S. 312, 336 (1893).

[7] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.1, at 593 (1989) ("The term *abstention* refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met.").

[8] *See also Garrett v. Hoffman*, 441 F. Supp. 1151, 1155-56 (E.D. Pa. 1977) (declaratory judgment should be barred only where judgment would lead to unseemly interference with state court litigation).

and denial of two motions for dismissal based on the lack of jurisdiction. The only interference results from the potential for a race to judgment.[9]

Where the federal case is filed substantially prior to the state case, and significant proceedings have taken place in the federal case, we perceive little, if any, threat to our traditions of comity and federalism. *See Moses H. Cone Hosp.*, 460 U.S. at 21-22 (fact that substantial proceedings have occurred is a relevant factor to consider in deciding whether to abstain). In fact, by filing a state suit after a federal action has been filed, the state plaintiff can be viewed as attempting to use the state courts to interfere with the jurisdiction of the federal courts. We agree with Royal that if we were to hold that *Jackson* applied in this scenario, litigants could use *Jackson* as a sword, rather than a shield, defeating federal jurisdiction merely by filing a state court action. Neither *Jackson* nor the concerns underlying it mandate such a result.

Citing *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 238 (1984), Quinn-L argues that abstention doctrines apply regardless of when the state suit is filed. *See also Hicks v. Miranda*, 422 U.S. 332, 349 (1975). We find this contention flawed for two reasons. First, Quinn-L mischaracterizes *Midkiff*. There, the Court noted that if substantial proceedings have occurred in federal court, that court need not abstain. 467 U.S. at 238. In other words, in

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[9] A race to judgment often is condoned. *See Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (approving of parallel proceedings in all but exceptional circumstances); *PPG Indus. v. Continental Oil Co.*, 478 F.2d 674, 677 (5th Cir. 1973) (citing *Kline v. Burke Constr. Co.*, 260 U.S. 206, 230 (1922)).

some cases the date on which the state court suit was filed can make a difference in the application of the abstention doctrine. Where substantial proceedings have begun, the federal court is allowed to proceed to prevent the state from employing abstention as a means to delay litigation.

Second, we find other types of abstention distinguishable. For example, in the case of *Younger*[10] abstention, the Court was concerned with federal court interference with a state's ability to function. By blocking proceedings involving state governments, federal courts could interfere unduly with the state's ability to govern. These federalism concerns are implicated no matter when the federal and state suits are filed: A state's ability to conduct proceedings is compromised if the officials conducting those proceedings are involved in discovery in federal court.

In *Jackson*, on the other hand, the filing of the federal suit demonstrated an attempt to overrule a decision by a state trial court. Federalism and comity concerns arose only because a litigant attempted to use the federal courts to interfere with ongoing state court proceedings. Thus, while the time of filing of the federal and state suits is irrelevant to the application of the Act, it can be an important consideration in determining whether to abstain under *Jackson*.

We conclude, however, that federal courts need not abstain from declaratory judgment actions under *Jackson* where the federal suit is filed substantially prior to any

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[10] *Younger v. Harris*, 401 U.S. 37 (1971).

state suits, significant proceedings have taken place in the federal suit, and the federal suit has neither the purpose nor the effect of overturning a previous state court ruling. We recently characterized the rule in *Jackson* as applying only where "a declaratory defendant has *previously* filed a cause of action in state court against the declaratory plaintiff." *Travelers*, 996 F.2d at 776 (emphasis added). Even where the state court suit is filed first, a class of exceptions to the *Jackson* rule exists. *Id.* at 776-79. Our decision today, declining to extend the rule to a case in which the federal suit has been the subject of significant proceedings before the state suit is even filed, comports with the policy concerns that prompted our decision in Jackson.[11]

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[11] The investors also argue that we should not give effect to the federal district court's declaratory judgment under the circumstances of this case, even though the federal court's judgment was rendered first. This is because, the investors argue, the federal court injunction prevented the state court from reaching judgment first.

The district court rendered its summary judgment on December 20, 1990, about 3½ months after the investors filed their state court actions on September 4, 1990. The state court set a tentative trial date for December 10 but, given the complexity of this action, we find it extremely unlikely that the state court could have tried this case and rendered judgment before December 20. We are persuaded, therefore, that the state court would not have entered judgment before the December 20 judgment of the federal district court, even if the federal court's October 30, 1990, injunction had not issued. Accordingly, we need not decide, in this case, whether the possibility that the state trial and judgment would have occurred first could be relevant under other circumstances.

III.

Quinn-L next contends that Royal was collaterally estopped from pursuing the second declaratory judgment action because it originally sought to reopen the first declaratory judgment action by filing a motion on January 3, 1990. In the February 28, 1990, order denying the request to reopen the first action, the district court stated the following: "Because this case has been closed and the issues may be litigated in the current state court litigation, the Court DENIES the Motion." Quinn-L argues that this order is determinative with respect to the forum in which the coverage issues are to be decided.

Quinn-L cites *New Orleans Pub. Serv. Co. v. Majoue*, 802 F.2d 166 (5th Cir. 1986), for that proposition. In *Majoue*, the defendant removed a state court suit, but the district court remanded it. The defendant later filed a federal declaratory action directed to the state claims. We stated that the original order remanding the case was "res judicata as to the forum." *Id.* at 168.

We find *Majoue* distinguishable. A decision to remand to state court may not be appealed, and the district court may not later change its mind. *Id.* at 167. In *Majoue*, we relied upon the language of 28 U.S.C. § 1447(d) (1988), which states that a remand order is not reviewable on appeal or *otherwise*. By filing a declaratory judgment action, the party was attempting to attack the district court's remand order collaterally, an action that is prohibited by statute.

Here, on the other hand, the declaratory judgment is not an attempt to attack the prior order collaterally, nor does any statute prohibit the action. Moreover, as Royal

argues, *Majoue* involved an attempt to evade a final judgment. Here there is no final judgment that could have any res judicata effect. We reason, accordingly, that the February 28, 1990, order does not collaterally estop Royal from pursuing this matter.

IV.

We next address Quinn-L's contention that the declaratory judgment and injunction must be vacated because the investors were not parties to the first declaratory judgment and because *Royal I* is not preclusive on the issue of coverage for negligently caused mental anguish and bodily injury. Royal argues that our decision in *Royal I* is law of the case as to both issues. Quinn-L disagrees and also argues that our decision was clearly erroneous.[12]

First, Quinn-L claims that the investors are not bound by the first declaratory judgment because they were not in privity with Quinn-L. We disagree with Royal's contention that *Royal I* establishes as law of the case that the investors were in privity with Quinn-L. As we noted in *Royal I*, the issue of privity is a question of fact for the trial court. 960 F.2d at 1297. Because the appeal was interlocutory, we reviewed that finding only for clear error. *Id.* Here, on the other hand, we review the district court's findings *de novo*, because that court has

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[12] We reject Quinn-L's contention that it did not have a full and fair opportunity to litigate these issues. *See Allen v. McCurry*, 449 U.S. 90, 95 Quinn-L had more than adequate representation and ample opportunity to litigate the coverage question.

rendered summary judgment. As we discussed above, law of the case may not be established on issues of fact where a later appeal involves a more demanding standard of review.

Reviewing the district court's decision *de novo*, we affirm. There is no material issue of fact as to privity, and the district court properly held that Quinn-L is the investors' virtual representative.

Second, Quinn-L contends that our *Royal I* decision was clearly erroneous on the question of the scope of the first declaratory judgment. Here, we agree with Royal that our prior holding is law of the case, and we will not set it aside unless it is "clearly erroneous and would work manifest injustice." *North Miss. Communications v. Jones*, 951 F.2d 652, 656 (5th Cir.), *cert. denied*, 113 S. Ct. 184 (1992). The res judicata effect of a prior judgment is an issue of law that depends upon an interpretation of the court's opinion. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988). Our decision in *Royal I* establishes a finding of law on the scope of the first declaratory judgment. In this situation, an interlocutory appeal establishes law of the case.

Nor do we perceive a reason to revisit *Royal I*. Quinn-L argues that in *Royal I* we ignored the requirement that an issue must be actually litigated and decided for issue preclusion to apply. *See Jackson*, 862 F.2d at 500. Quinn-L contends that the question of whether an accident had occurred was not litigated.

The term "occurrence" is defined in the policies as "an accident . . . which results in bodily injury or property damage. . . . " Quinn-L contends that a finding of no

"occurrence" by the district court could mean either (1) that the pleading does not allege an "accident" or (2) that the accident alleged in the pleading is not alleged to have caused either "property damage" or "bodily injury." We agree with Quinn-L's characterization of a finding of "no occurrence": That finding could have either meaning.

Quinn-L goes on to contend that we assumed in *Royal I* that the first declaratory judgment determined that there had been no accident. Quinn-L argues that this issue was never litigated in the first declaratory judgment action. We disagree.

The district court made separate findings in the first declaratory judgment action, to the effect that the pleadings do not allege an "occurrence," "property damage," or "personal injury" as defined by the policies. If the finding of no occurrence does not constitute a finding that no accident occurred, there would have been no need to enter a separate finding that no property damage or personal injury had occurred. The only reasonable reading of the first declaratory judgment opinion is that the court decided both that there was no accident and that no property damage or personal injury had occurred.[13]

Moreover, this allegation actually was litigated. In its motion for summary judgment, Royal requested that the court make separate findings that no "occurrence" had been alleged and, additionally, that no "personal injury"

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[13] *See also Royal I*, 960 F.2d at 1295 nn. 10, 11 (discussing footnote 3 of partial summary judgment opinion, which acknowledged mental anguish as personal injury but still concluded that such injury was not caused by an "occurrence").

or "property damage" had been alleged. Again, if Royal was seeking to litigate only the absence of personal injury or property damage, it would not have needed to ask for both findings.

In addition, Quinn-L's counterclaim placed the issue of whether an "occurrence" was alleged before the district court. The district court obviously felt that the issue was before it, as it concluded that despite the allegation of mental anguish (an injury Royal conceded would be covered), no "occurrence" had been alleged. Finally, Quinn-L contends that we erred in *Royal I* by ignoring the "actually decided" requirement for collateral estoppel. Quinn-L claims that the issue of coverage for mental anguish was not "actually decided" by the court in the first declaratory judgment action. We disagree. As we explained in *Royal I*, the district court expressly indicated that any mental anguish was not caused by an occurrence within the meaning of the policy. 960 F.2d at 1295 & nn. 10, 11. The court did actually decide the issue.

V.

Essentially for the reasons given by the district court, we agree that no material issue of fact exists as to the claims of waiver, estoppel, and negligence, and we affirm the district court's grant of summary judgment on those claims. We find Quinn-L's claim that the district court should have recused itself to be completely without merit and therefore affirm on that issue.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7038
No. 90-7070

ROYAL INSURANCE COMPANY OF AMERICA and
ROYAL LLOYDS OF TEXAS,

Plaintiffs-Appellees,

VERSUS

QUINN-L CAPITAL CORPORATION, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(Filed May 5, 1992)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The district court enjoined the appellants from pursuing their suit in state court; the appellants contend that the injunction violates the Anti-Injunction Act ("the Act"), 28 U.S.C. § 2283. We find that the portion of the injunction based upon the "relitigation" exception to the Act was proper. We further find that the portion of the injunction based upon the "in aid of jurisdiction" exception was improper. We therefore affirm in part, reverse in part, and remand.

I.

In May 1987, some 157 investors ("the investors") brought twenty-six lawsuits in federal district court against numerous Quinn-L entities ("Quinn-L") and other parties. The investors, who alleged that they had lost money in various real estate investments offered or managed by Quinn-L, asserted claims under federal securities and anti-racketeering laws as well as Texas law. The cases were assigned to Judge Barefoot Sanders, who consolidated them ("the federal liability suit").

Subsequently, Quinn-L asked Royal Insurance Company of American and Royal Lloyds of Texas (collectively "Royal") to defend it in the federal liability suit pursuant to several insurance policies it had issued to Quinn-L. Royal agreed to do so but reserved its right to contest coverage. On May 10, 1988, Royal filed a declaratory judgment action ("first federal declaratory judgment action"), asking the court to determine whether Royal had a duty to defend or indemnify Quinn-L against the investors' claims brought in the federal liability suit. This declaratory judgment action also was assigned to Judge Sanders.

On June 6, the investors moved to intervene in the federal declaratory judgment action – a motion Royal opposed. The court denied the motion on the ground that the investors had failed to meet the requirements for intervention as of right and that their interest would be protected adequately by Quinn-L.

Royal moved for partial summary judgment on December 12, 1988. While this motion was pending, the

investors entered into a settlement agreement dated April 5, 1989, with Mark Lovell, the sole shareholder of all but one of the Quinn-L entities.[1] Lovell promised to cooperate with the investors in the litigation against Quinn-L and to assign to them any claims he might have against Royal; in return, the investors promised not to pursue any claims against him.[2] The district court found that "settlement negotiations between the Investors' counsel and Lovell started as early as June, 1988 and resulted in a letter agreement by October 11, 1988." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216, 1224 n.10 (N.D. Tex. 1990) ("*Royal*"). It also found that the "sole purpose" of this agreement was to pursue Royal. *Id.* at 1224.

On April 14, 1989, the court granted Royal's partial summary judgment motion, concluding that Royal's policies did not impose any duty to defend or indemnify Quinn-L against the investors' claims in the federal liability suit. The court held that

> the language of the insurance coverage is unambiguous. . . . As a matter of law, the allegations in the pending suits do not state claims within coverage. Although the investors allege loss of their investments, they allege no injury to tangible property which could constitute an "occurrence". Additionally, none of the losses

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[1] The exception is Quinn-L Capital Corporation. Lovell is the sole owner of all of its voting stock and is the beneficial owner of all of its assets.

[2] At this point, Lovell was not a party to the federal liability suit. The investors had, however, objected to the discharge of their claims in Lovell's personal bankruptcy proceedings.

> constitutes "property damage" as required by the policy. [Footnote and citation omitted.]

The court added that "[n]either have Defendants shown that personal injuries (in the form of mental anguish) were caused by an 'occurrence'." The court formally entered partial summary judgment in favor of Royal on April 27.

On May 4, Quinn-L notified the district court regarding the status of the litigation. It stated that in view of the partial summary judgment, no issues remained to be litigated aside from attorneys' fees.

The investors moved to dismiss all their pending actions against Quinn-L on August 3, stating that they and Quinn-L had "reached an agreement in principle for settlement of [their] claims and anticipate reaching an agreement as to the precise terms and conditions of settlement over the next few weeks" and requesting the dismissal in order to "further streamline the litigation pending in this Honorable Court." On August 28, the court dismissed the federal liability suit in its entirety, dismissing the federal claims with prejudice and – declining the exercise pendent jurisdiction – dismissing the state claims without prejudice.

The court entered a final judgment on the federal declaratory action on September 8. At that time, the court again held that Royal had no duty to defend or indemnify Quinn-L for any claims brought in the federal liability suit. This judgment was not appealed.

Approximately five days later, the investors filed suit against Quinn-L in state court in Dallas County, based upon the same events and conduct at issue in the just-

dismissed federal liability suit. In October, Lovell, on behalf of Quinn-L, directed his personal attorney to request that Royal defend Quinn-L in the Dallas County litigation. Royal offered to provide a defense subject to a reservation of rights – the same offer it had made in relation to the federal liability suit.

While awaiting Quinn-L's response, Royal retained an attorney, Coyt Randal Johnston, to represent Quinn-L in the Dallas County case. Because Royal had not received a response from Quinn-L regarding its offer of a qualified defense, Johnston entered a general denial on November 17.

On January 9, 1990, Lovell rejected Royal's offer and demanded an unqualified defense. As the district court later found, "[t]he evidence conclusively establishes that Lovell, on behalf of the Quinn-L Entities, refused Royal's offer of a defense subject to a reservation of rights at the urging of the Investor Plaintiffs." *Royal*, 759 F. Supp. at 1224.[3] Royal declined to acknowledge coverage and instructed Johnston to take no further action in the Dallas County action.

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[3] In a deposition taken on October 18, 1990, Lovell stated:

There was certainly an offer of some type of a defense offered me by Royal or to the companies. I had gone through a similar situation like that with Royal on other situations [i.e., in the federal liability action]. And for two reasons, one, my own and, two for the purposes as part of my settlement agreement with the [investors], I advised to keep them informed.

I refused to accept a settlement or a defense unless there was a full defense. Coverage, I guess, is what it is. I would still maintain that because of those two things that I just mentioned.

Royal repeatedly notified Lovell and his personal attorney that Johnston would no longer take any action in that suit. In a letter dated April 24, Johnston warned them of the "significant risk" of default if they failed to retain new counsel.

On May 16, Johnston filed his motion to withdraw, which was granted on May 30. On May 21, while Johnston's withdrawal motion was pending, the investors served Quinn-L (through Johnston) with numerous requests for admissions. Johnston answered the requests, denying the majority of them. On June 27, the investors moved to strike the responses on the ground that Johnston had prepared them without his client's input. On July 6, a visiting judge granted the investors' unopposed motion to deem the denied requests "admitted."[4]

The Dallas County litigation proceeded to trial the first week of August; Quinn-L did not make an appearance. Based solely upon the deemed admissions obtained by the investors, the court entered a default judgment against Quinn-L in the amount of $741 million, including "actual damages consisting of [lost] investment, . . . damages for bodily injury including mental pain, suffering and anguish which has manifested itself physically," attorneys' fees, and exemplary damages "in an amount equal to treble the actual damages suffered by each Plaintiff."

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[4] In their brief, the appellants note that "[b]y this time, Johnston finally had withdrawn from Quinn-L's defense. Quinn-L, however, was unable financially to hire its own counsel to defend the suit, and, therefore, was unrepresented and did not participate further."

On September 4, Quinn-L (through Lovell) assigned its rights and causes of action against Royal to the investors. In exchange, the investors agreed to pay (1) Quinn-L ten dollars, and (2) Lovell five percent of any further recoveries against Royal in excess of the $741 million default judgment.[5]

On the same day the assignment was executed, the investors filed suit against Royal in state court in Cameron County, bringing claims in two capacities. As assignees of Quinn-L, the investors brought tort, waiver, and estoppel claims based upon Royal's handling of the Dallas County litigation. As judgment creditors, the investors sought recovery of the Dallas County judgment under the applicable insurance policies. On September 17, the investors filed a second action in Cameron County seeking a declaration of coverage for the damages awarded in the Dallas County judgment.

The Cameron County litigation proceeded at an accelerated pace. The day after suit was filed – before Royal had even been served – the court set a trial date of December 10. This was in violation of the court's rules, which provide that a case will be set for trial only after the filing of an answer. *See* Cameron County Civ. Ct. R. 1.5(a). On October 12, the investors filed a motion for summary judgment, which was set for hearing on November 8.

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[5] In the Cameron County action, discussed *infra*, the investors seek to treble the amount of the default judgment. Lovell's share of the potential $2.2 billion judgment would be some $74 million. *See Royal*, 759 F. Supp. at 1226 n.13.

The present action stems from Royal's attempt to enlist the federal district court's aid in enforcing the September 1989 declaratory judgment issued in its favor. On March 9, 1990, while the Dallas County action was pending, Royal filed this suit in federal court (again, before Judge Sanders) seeking a declaratory judgment that would establish that it had no duty to defend or indemnify Quinn-L in the Dallas County litigation.

Quinn-L filed an answer on August 15. It asserted as affirmative defenses, *inter alia*, those claims the investors would bring on September 4 in the Cameron County litigation as Quinn-L's assignees (i.e., the tort, waiver, and estoppel claims). On September 4, Royal moved to add the investors as defendants.

On October 30, Royal asked the federal court to issue a preliminary injunction against further prosecution of the entire Cameron County litigation. After a hearing, the court granted Royal's request. The court found that

> [t]o state the facts bluntly but fairly, the Investor Plaintiffs bought Lovell's cooperation with their April 5, 1989 Agreement and through their collusion with Lovell obtained an enormous default judgment against Lovell's companies.

759 F. Supp. at 1226. The appellants now ask us to reverse the district court's order granting Royal's request for a preliminary injunction.

Prior to oral argument of this case, the appellants filed a petition for writ of prohibition, and in the alternative, a motion for a stay, to prevent the district court from considering any other aspects of this case pending their appeal of the preliminary injunction. We denied their

requests on September 9, 1991. Oral argument was held on October 2.

On October 29, the appellants asked this court to reconsider its earlier denial of the stay. On December 20, while this motion was pending, the district court (1) denied the appellants' motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(7); (2) denied their motion for continuance and reopening of discovery; (3) granted Royal's motion for summary judgment on the appellants' affirmative defenses of tort, waiver, and estoppel; and (4) deferred consideration of Royal's application for permanent injunctive relief, pending this appeal. On December 24, the appellants asked us to "vacate all orders entered by the court below during the pendency of the improperly issued preliminary injunction, including the December 20, 1991 summary judgment order." Thus, in addition to the propriety of the district court's preliminary injunction, we consider the appellants' request to vacate the district court's orders of December 20.

II.

First, the appellants challenge the district court's subject matter jurisdiction over the present controversy. They argue that the requirement of complete diversity is absent, *see Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)), as Royal Lloyds of Texas, one of the plaintiffs, is a Texas citizen, as are several of the defendants. They also question whether the district court had jurisdiction over the first declaratory judgment action.

A.

Royal Lloyds of Texas is an unincorporated association of insurance underwriters. Citizenship of such an unincorporated association is determined by the citizenship of its "members." *Id.* at 195-96. None of the underwriters is a Texas citizen.[6] Texas law, however, requires that "Lloyd's Plan" insurers such as Royal Lloyds of Texas designate "an attorney in fact or other representative[]" to execute "[p]olicies of insurance." Tex. Ins. Code Ann. art. 18.01-1. The attorney-in-fact must be a citizen of Texas, *see id.* art. 18.02, and Royal Lloyds of Texas's attorney-in-fact is Royal Lloyds, Inc., a Texas corporation.

The appellants argue that as attorney-in-fact, Royal Lloyds, Inc., is a "member" of the unincorporated association of Royal Lloyds of Texas. Royal disagrees, arguing that an attorney-in-fact is a mere agent of the underwriters, not a member. We need not resolve this question, however, for the district court could exercise ancillary jurisdiction over this controversy regardless of the citizenship of the parties.

It is well settled that a federal district court can exercise ancillary jurisdiction over a second action in order "to secure or preserve the fruits and advantages of a judgment or decree rendered" by that court in a prior action. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 868 (5th Cir. 1984) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 238 (1934)). Such jurisdiction is appropriate where the effect of an action filed in state court

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[6] According to Royal, the Royal Lloyds of Texas underwriters are citizens of New York and North Carolina.

would "effectively nullif[y]" the judgment of a prior federal action. *Id.* This is true even where the federal district court would not have jurisdiction over the second action if it had been brought as an original suit. *Local Loan Co.*, 292 U.S. at 238; *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 89-90 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

As discussed more fully *infra*, Royal returned to federal court in order to prevent the appellants from robbing it of the " fruits and advantages" of the federal declaratory judgment rendered in its favor. Because both the Dallas County and Cameron County litigation had the potential of "effectively nullify[ing]" the previous declaratory judgment, we conclude that the district court had ancillary jurisdiction over the present controversy.

B.

The appellants also argue that the district court did not have subject matter jurisdiction over the first declaratory judgment action. From this they conclude that Royal should not be able to bootstrap its way into federal court by filing a second action that depends upon a prior action over which the district court had no jurisdiction.

The appellants, however, cannot launch such a collateral attack on the district court's subject matter jurisdiction. As the Supreme Court has stated,

> A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata

> apply to jurisdictional determinations – both subject matter and personal.

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) (citations omitted).

The question is not whether the issue of subject matter was actually litigated, but instead whether the parties had the opportunity to raise the question. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987). If the parties against whom judgment was rendered did not appeal, the judgment becomes final and the court's subject matter jurisdiction is insulated from collateral attack. *Id. See also Donovan v. Mazzola*, 761 F.2d 1411, 1416 n.2 (9th Cir. 1985).

The final judgment in the first declaratory action was not appealed. The subject matter jurisdiction of the district court thus is not subject to collateral attack.[7]

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[7] The investors respond that this is not a "collateral attack" because they were not parties to the first declaratory action (their motion to intervene having been denied). Thus, they argue, they had "no opportunity to litigate subject matter jurisdiction." As a preliminary matter, the investors, as assignees of Quinn-L, would stand in no better position than Quinn-L, which is bound by the earlier judgment. In addition, as developed more fully *infra*, the investors are also bound to the first declaratory judgment as judgment creditors, for they were "virtually represented" by Quinn-L during the first declaratory judgment action. *See infra* part III.A.3.

III.

The appellants next contend that the preliminary injunction violates the Anti-Injunction Act, 28 U.S.C. § 2283, which provides,

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The district court utilized the second and third exceptions to enjoin two different types of claims at issue in the Cameron County litigation.

First, it used the "protect or effectuate" judgments, or "relitigation," exception to enjoin the investors' claims brought as judgment creditors. 759 F.Supp. at 1235. These "direct" claims were brought under the policy to recover damages up to the policy limits. The district court found that it had decided the issue of "coverage" under the language of the applicable Royal policies in the first declaratory judgment action, *id.* at 1234, and that therefore any attempt to relitigate the coverage issue – such as an attempt to recover under the policy language – was barred. *Id.* at 1235.

Second, it enjoined the remaining tort, waiver, and estoppel claims under the "in aid of jurisdiction" exception. These claims, which depend upon conduct and events that occurred after the issuance of the first declaratory judgment, were brought by the investors as assignees of Quinn-L. The district court enjoined the pursuit of these "post-declaratory judgment" claims, which were also before the district court as affirmative defenses

to Royal's second declaratory judgment action, on the ground that "absent the injunctive relief sought by Royal, the [Cameron County court] could irreparably injure the [district court's] ability to decide the present case." *Id.* We will consider the two separate facets of the preliminary injunction in turn.

A.

The relitigation exception was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). The exception is grounded in principles of *res judicata* and collateral estoppel. *Id.* An "essential prerequisite" for application of the relitigation exception "is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Id.* at 148. *See also Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 501 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

In determining which issues have been "actully decided," the emphasis is on the record and on what the earlier federal court *actually said*, not on the court's *post hoc* judgment as to what the previous judgment was intended to say. *Chick Kam Choo*, 486 U.S. at 148. Any doubt as to whether the order precludes subsequent claims must be resolved in favor of allowing the state court to proceed. *Jackson*, 862 F.2d at 499.

This analysis requires us to compare the issues "actully decided" by the district court in the first federal declaratory judgment action with the issues raised in the

direct contractual obligation claim brought by the investors in Cameron County.

1.

Royal's contractual obligations rest on the policy language[8] in question, which requires it to

> pay on behalf of [Quinn-L] all sums which [it] shall become legally obligated to pay as damages because of
>
> (A) bodily injury or
>
> (B) property damage
>
> to which this insurance applies, caused by an occurrence. . . .

"Occurrence" is defined as

> [a]n accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

In its final judgment disposing of the declaratory judgment action dated September 8, 1989, the court stated,

> 1. The allegations in the pending [] suits do not allege an "occurrence," as defined by the policies;

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[8] Although numerous policies were at issue throughout the federal and state litigation, the parties agree that this is the essential policy language.

> 2. The allegations in the pending suits do not allege [] "property damage," or "personal injury" as defined by the policies;
>
> 3. Petitioners, Royal Insurance Company of America and Royal Lloyds of Texas, have no duty to defend the Defendants in the pending suits. . . .

The appellants first argue that the federal declaratory judgment has little or no binding effect because it was a "specific declaration with respect to existing pleadings that were subject to change before, during, or even after trial." The appellants then stress that the final judgment "declares nothing with respect to Royal's obligations should the pleadings be amended, let alone with regard to a different lawsuit not even pending at the time the declaration issued." In other words, the declaratory judgment should be read as applicable only to those pleadings pending before the district court at the time.

Taken to its logical extreme, this argument defeats itself. Under appellants' rule, the losing party could defeat an adverse declaratory judgment by changing one word of its pleadings and filing them in state court. We thus reject the appellants' construction of the declaratory judgment as artificial and unnecessarily formalistic.[9]

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[9] The appellants indeed take their argument to the logical extreme. Focusing upon the district court's use of the "pending suits" language, the appellants contend that the declaratory judgment has no meaning because there were no liability suits pending before the district court at the time (The federal liability suit had been dismissed by the court on August 28; the final declaratory judgment action was issued on September 8.) We again reject appellants' needless formalism.

Instead, we give the district court's decision a more natural reading. Based upon the language of the policy, there must be an occurrence and an injury in order for there to be coverage. In this case, the district court found that the investors' injuries – as alleged in the complaint – were not caused by an occurrence. Without an occurrence, there could be no coverage, and thus there was not duty to defend.[10] In sum, the district court did not simply

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[10] The appellants reject this reading of the policy. They emphasize the policy's definition of "occurrence." They conclude that in order for there to be an occurrence, there must be an accident and injury. From this, they argue that the district court did not necessarily conclude that there was no accident, but rather could have based its "no occurrence" finding on "no injury" – i.e., no mental anguish.

This argument neglects the fact that the district court, in order to find that Royal had no duty to defend the federal liability suit, was obligated to consider the investors' claims of mental anguish. An insurer may be excused from its duty to defend only if "no state of facts could be proved" that would come within the policy coverage. *Green v. Aetna Ins. Co.*, 349 F.2d 919, 926 (5th Cir. 1965). Thus, as Royal argues, "the court could not properly have ignored the Investors' allegations of personal injury – which had long been before it in Quinn-L's counterclaim and summary judgment briefs, in the Investors' proposed amended petitions, and in the Investors' representation that such injuries were 'subsumed in' their previously asserted claims. . . . " The district court could not, as a matter of law, rule that the investors suffered no bodily injury, for that would be a disputed factual issue. The only decision it could make, as a matter of law, would be that whatever the injuries, they were not caused by an occurrence or accident. And this is what the court did indeed conclude in its April 14, 1989, partial summary judgment order when it stated that the "Defendants [failed to show] that personal injuries (in the form of mental anguish) were caused by an 'occurrence'," *see infra* n.11.

decide whether the investors had alleged "injury" caused by an "occurrence," but instead necessarily determined that the investors' allegations did not fit within the coverage of the policy language.[11]

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[11] This conclusion is further supported by the district court's order of April 14, 1989. In its memorandum opinion and order, which awarded partial summary judgment in Royal's favor, the district court stated,

> The Court finds that the language of the insurance coverage is unambiguous. . . . As a matter of law, the allegations contained in the pending suits do not state claims within coverage. Although the investors allege loss of their investments, they allege no injury to tangible property which could constitute an "occurrance".[3] Additionally, none of the losses constitutes "property damage" as required by the policy.
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>
> [3]Neither have Defendants shown that personal injuries (in the form of mental anguish) were caused by an "occurrence".

[Citation and footnote omitted.] In other words, the investors suffered "no injury" – either to property or in the form of mental anguish – that "could constitute an 'occurrence' " within the terms of the policy.

We recognize that orders of partial summary judgment, standing by themselves, have no preclusive effect, as they are interlocutory. *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269-72 (5th Cir. 1986). *Avondale*, however, does not prevent us from considering the preclusive effect of the summary judgment order in this case.

As we noted in *Avondale*, the partial summary judgment order in that case had no preclusive effect because the final judgment "made no direct or indirect reference whatever to [prior] partial summary judgment or to prior orders in general. . . . " *Id.* at 1272. By contrast, the September 8 final judgment against [Quinn-L] in light of the Court's ruling on [Royal's] Motion for Partial Summary Judgment." The "partial" summary judgment was "partial" in name only. It decided the

The case cited by the appellants discussing the complaint-allegation rule are not to the contrary. It is true that "[u]nder Texas law, the insurer's duty to defend is determined solely from the face of the pleadings and without reference to facts outside of the pleadings." *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983). Application of this "complaint-allegation" rule "gives rise to a duty to defend if one or more of the plaintiff's claims, 'if taken as true, [are] sufficient to state a cause of action . . . coming within the terms of the policy.' " *Id.* (citation omitted).

But simply because the duty to defend is determined on the face of the complaint, and not with reference to the truth or falsity of the allegations contained therein, does not mean that the preclusive effect of a declaration of no duty to defend must be limited to the precise allegations contained in the pleadings. In this case, the district court determined the issue of coverage – that no "occurrence" had befallen the investors within the terms of the policy – and this determination can be applied to allegations in subsequent complaints.[12]

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major issues in the case and entry of the final judgment was a mere formality.

[12] The appellants argue that the district court erroneously applied principles of claim preclusion, as opposed to issue preclusion, in coming to this conclusion. Although the court did mention claim preclusion in its opinion, its analysis of the first declaratory judgment plainly states that "the Court finally interpreted the language in certain policy clauses, and the *issue* of the meaning of those clauses was *necessary and essential* to the Court's Judgment," 759 F. Supp. at 1234 (emphasis added) – language of issue preclusion. We therefore disagree with the appellants that the district court ran afoul of *Jackson*. *See Jackson*,

2.

We now must compare the foregoing interpretation of the district court's final judgment with the investors' claims in the Cameron County litigation. In their original petition, the investors allege the following:

> 29. The injuries suffered by Plaintiffs as a result of Quinn-L Entities['] conduct, for which damages have been awarded by [the Dallas County] Judgment *are injuries which are covered* by the relevant insurance policies issued by Defendants The Royal Insurance Group. . . .
>
> 30. The allegations of Plaintiffs' complaint in [the Dallas County petition] *stated an "occurrence" which had resulted in "property damage" or "bodily injury,"* as defined by the insurance policies. . . . The Quinn-L E[n]tities' conduct . . . has caused the Plaintiffs property damage and bodily injury and, therefore, the Defendants are responsible for the payment of the Judgment entered therein.
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> . . .
>
> 32. [Royal is] liable directly to Plaintiffs, as judgment creditors under the [Dallas County judgment]. The Plaintiffs, judgment creditors, would further allege that [Royal is liable] to them for the entirety of the judgment rendered

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862 F.2d at 501 (noting that "true" res judicata, or claim preclusion, "appears to be inconsistent with *Chick Kam Choo's* admonishment that the relitigation exception 'is strict and narrow' so that only 'claims or issues which . . . actually have been decided' in the prior proceeding as reflected by what the prior 'order *actually* said' are protectable thereunder" (citation omitted)).

> - [in the Dallas County judgment] against the Quinn-L Entities . . . *for the reason that the policies of insurance purchased by Quinn-L Entities provide coverage for the injuries caused to Plaintiffs by the Quinn-L entities and upon which judgment was granted by the [Dallas County court].* [Emphasis added.]

Given that the investors allege that the Dallas County judgment would be covered by the policy language, the question is whether the investors, after the issuance of the first federal declaratory judgment, amended their pleadings in such a way as to bring their claims within policy coverage. Indeed, the investors argue that they substantially altered their claims between September 8 (the date the district court entered its final declaratory judgment) and September 14 (the date the investors refiled their state claims in Dallas County state court).

The crucial difference, they argue, is that the Dallas County action they "alleged mental anguish caused by Quinn-L's negligence and gross negligence" in making a number of improper management decisions.[13] They argue that in the first declaratory judgment action, the sole

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[13] In the Dallas County petition, the investors alleged that "Plaintiffs' . . . injuries and damages were proximately caused by the negligent conduct of Defendant in," among other things, "improperly treating all partnerships and companies as one entity for financial purposes," "syndicating partnerships while having lack of the financial wherewithal to fund the cash needs of the partnerships," and "improperly managing and structuring the companies and partnerships and thereby creating tax problems with the IRS concerning various entities." These improper acts caused the investors to "suffer[] bodily injury, including mental pain, suffering and anguish."

dispute was over whether the investors alleged mental anguish. In the words of the appellants, "the declaratory judgment only decided that the then pending action did not allege mental anguish."

As noted above, however, the declaratory judgment did more than that. The appellants' reading of the judgment simply ignores the fact that the court held that "allegations in the pending[] suits do not allege an 'occurrence,' as defined by the policies." Thus, the only way that the appellants could overcome the declaratory judgment hurdle was to allege, in the Dallas County petition, a basis for finding an occurrence.

The allegedly improper acts on Quinn-L's part, however, remained constant from the federal liability suit to the Dallas County suit. Thus, the district court's determination of the coverage issue would dispose of the appellants' claims to recover under the policy language. We therefore affirm the district court's injunction of the appellants' direct contractual claims under the relitigation exception.

3.

The investors respond that they cannot be bound by the first declaratory judgment because they were not parties to the action (their motion to intervene having been denied). We have recognized, however, that "it is within the discretion of a district court to expand the scope of an otherwise valid injunction issued pursuant to the relitigation exception of the Anti-Injunction Act to include those in privity with parties to the federal court

action." *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1322 (1991).

Indeed, a non-party will be considered "in privity, or sufficiently close to a party in the prior suit so as to justify preclusion," where the party to the first suit is so closely aligned with the nonparty's interests as to be his "virtual representative." *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-75 (5th Cir. 1987). *See also Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). In order for virtual representation to arise, however, there must be "an express or implied legal relationship" between the party and the nonparty "in which [the] part[y] to the first suit [is] accountable to [the] non-part[y] who file[s] a subsequent suit raising identical issues." *Benson & Ford*, 833 F.2d at 1175 (citation omitted).

The question of "whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court." *Aerojet-Gen.*, 511 F.2d at 719. In the preliminary injunction context, we review findings of fact for clear error. *Apple Barrel Prods. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984).

In this case, the district court found that the investors were in privity with Quinn-L. 759 F. Supp. at 1232. The court concluded that the "Investor Plaintiffs bought Lovell's cooperation with their April 5, 1989 Agreement and through their collusion with Lovell obtained an enormous default judgment against Lovell's companies." *Id.* at 1226. The court further found that "settlement negotiations between the investors' counsel and Lovell started as early as June, 1988 and result in a letter agreement by

October 11, 1988." *Id.* at 1224 n.10. Thus, Lovell and the investors came to a cooperation agreement long before anything of substance was adjudicated in the first declaratory judgment action.

The appellants stress that in the October 1988-April 1989 assignment, Lovell gave the investors only the right to sue in Lovell's name for the damages Royal had caused him personally and that only later (September 4, 1990) did Quinn-L assign its rights to the investors to pursue Royal. But simply because the formal legal relationship between Quinn-L and the investors did not arise until September 4, 1990, does not mean that there was no privity between them before that time.

The district court found that Lovell had sole authority to act for Quinn-L, 759 F. Supp. at 1219 n.1,[14] that Lovell was "bought off" by the settlement agreement, *id.* at 1226, that the "sole purpose" of that agreement was to pursue Royal,[15] *Id.* at 1224, and that from that point on the investors and Quinn-L (through Lovell) pursued a course of conduct to obtain a hefty payment from Royal in which they would all share, *id.* at 1226 & n.13. The district court did not clearly err in concluding that the investors were virtually represented by Quinn-L in the

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[14] In January 1989, the bankruptcy court returned Quinn-L's valueless stock to Lovell. Since Lovell filed for personal bankruptcy in 1987, Quinn-L has had no officers, directors, or significant assets. Thus, since January 1989 Lovell has had sole authority to act for Quinn-L. *See Royal*, 759 F. Supp. at 1219 n.1.

[15] In a letter written to Lovell's counsel, the investors' attorney noted that "the whole point of the [April 5] Compromise and Settlement Agreement was for Plaintiffs to be able to pursue Royal Insurance Company."

first declaratory judgment action. We therefore determine that the investors can be bound by the first declaratory judgment action.

B.

In their Cameron County suit, the investors also seek to recover damages from Royal based upon Royal's post-declaratory judgment conduct. As Quinn-L's assignees, the investors allege, *inter alia*, that Royal (1) "wrongfully refused" an unqualified defense of the Dallas County litigation; (2) "negligently failed" to settle the Dallas County litigation; (3) waived its right to challenge coverage and is estopped from denying coverage because of its representations to Quinn-L; (4) was negligent in its handling of the Dallas County litigation; and (5) breached its "duty of good faith and fair dealing."

These claims were brought before the federal district court on August 15, 1990, when Quinn-L answered Royal's declaratory judgment petition of March 9, 1990. They were presented to the Cameron County court on September 4, 1990, when the investors filed suit therein. The district court enjoined these post-declaratory judgment claims under the "in aid of jurisdiction" exception to the Anti-Injunction Act."[16]

1.

The "in aid of jurisdiction" exception is designed to "prevent a state court from so interfering with a federal

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[16] Royal has conceded that the injunction of these claims cannot be justified under the relitigation exception.

court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970). The district court noted that "[t]his is precisely such a case; absent injunctive relief the Court will likely lose the ability to decide this case (filed well before either [Cameron County] Action) and may well have its prior Judgments (which are inextricably intertwined with the present action) nullified by contrary state court decrees." 759 F. Supp. at 1235.

The "in aid of jurisdiction" exception, however, does not reach this far. In *Texas v. United States*, 837 F.2d 184, 186 n.4 (5th Cir.), *cert. denied*, 488 U.S. 821 (1988), we noted the following:

> In cases decided under [the "in aid of jurisdiction"] exception, courts have interpreted the language narrowly, finding a threat to the court's jurisdiction *only where a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction, or where the state proceeding threatens the continuing superintendence by a federal court*, such as in a school desegregation case. In no event may the "aid of jurisdiction" exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision. [Emphasis added.] [Citations omitted.]

See also Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 132 (5th Cir. 1990) (exception only applies to *in rem* actions, citing *Texas v. United States*). The post-declaratory judgment claims at issue in this case do not fit in either

category described in *Texas v. United States*. They obviously do not involve the district court's *in rem* jurisdiction, nor do they implicate any "superintendence" jurisdiction on the district court's part.

Royal correctly points out that the contours of the categories described in *Texas v. United States* are not well-defined. The district court relied upon an Eleventh Circuit holding that "lengthy, complicated litigation is the 'virtual equivalent of a res,' " *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989) (citation omitted), and indeed our opinion in *Texas v. United States* does not specifically preclude such interpretation.[17] But even if

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[17] The district court also relied heavily upon our decision in *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. Unit A Oct. 1981), *cert. denied*, 456 U.S. 936 (1982), which involved a massive antitrust class action against manufacturers of corrugated containers that was consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the Southern District of Texas. The multidistrict court approved of "settlements executed between the class plaintiffs and most of the defendants." *Id.* at 1335.

Some of the class plaintiffs, apparently unhappy with the settlements, went to state court with their claims. A panel of this court held that the injunction of the state action was proper because the multidistrict court's approval of the settlements would "bar the South Carolina litigation" on principles of *res judicata*. *Id.* Thus, the panel based its decision upon the *relitigation* exception, and to that extent the case does not support the district court's injunction of the tort, waiver, and estoppel claims.

The *Corrugated Container* case does contain some jurisdictional language, but it must be construed in light of the factual circumstances, of the case. When the plaintiffs filed in state court, they asked for and immediately obtained an injunction prohibiting the defendants (many of whom were defendants in

we were to broaden the "in aid of jurisdiction" exception to include "lengthy, complicated litigation" that is the "equivalent of a res," we would not put the present action in that category.

The Cameron County court posed no threat to the district court's continuing jurisdiction to decide the post-declaratory judgment claims, other than the fact that there was a possibility that it could reach judgment first. This is not sufficient to invoke the "in aid of jurisdiction" exception. *Texas v. United States*, 837 F.2d at 186 n.4 (citing *Atlantic Coast Line*).[18] It is true that, as Royal argues, the

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the multidistrict litigation) from "preparing, disseminating or utilizing any settlement document . . . wherein such settlement document contains any release of any antitrust claims" under state law. *Id.* at 1335. The panel noted that this limitation "would clearly interfere with the multidistrict court's ability to dispose of the broader action pending before it." *Id.* The court also noted that the multidistrict court's injunction of the state suit would not flout "the policies of federalism" because the plaintiffs' attorneys "ha[d] taken, and manifested an intention to continue to take, actions threatening this court's exercise of its proper jurisdiction and the effectuation of its judgments, by filing and threatening to file duplicative and harassing litigation in the courts of various states and by seeking therein orders disrupting the proceedings" in the multidistrict litigation. *Id.* (quoting the multidistrict court).

This interference, however, was based upon the attorneys' (and, presumably, the state court's) apparent disregard of the prior federal settlement judgment – again, a consideration more appropriate for the *relitigation* exception. Thus, we disagree with the district court when it states that "[t]he same considerations [as those posed in *Corrugated Container*] apply to the present action. . . . " 759 F. Supp. at 1236.

[18] The nature of the "threat" is shown most vividly by the fact that the district court entered an order disposing of these

district court invested a great deal of time in resolving the first declaratory judgment action and in enforcing the first declaratory judgment in the second declaratory judgment action. But the investment is adequately protected by the relitigation exception, which avoids "costly and judicially wasteful" duplicative proceedings. *Quintero*, 914 F.2d at 721.

The district court's investment of time and energy in resolving the coverage issue would be protected by an injunction barring relitigation of that issue – not by barring *any claim* dependent upon that issue. We therefore conclude that the district court should have limited the scope of its injunction to enjoining relitigation of the coverage issue and that its injunction of the post-declaratory judgment claims was improper.

2.

Royal offers a slightly different justification for enjoining the post-declaratory judgment claims. It contends that the district court "was entitled to conclude that the [Cameron County] litigation should be temporarily enjoined until the district court had an opportunity to sort through the complex web of claims raised against enforcement of its prior judgment." In essence, Royal argues that, given that this is a preliminary injunction, the district court should be given greater leeway with regard to the injunction's scope, especially considering

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claims on December 20, 1991. The district court's resolution of these claims is discussed *infra* part IV.

that the district court found to be collusive behavior on the appellants' part.

Although we are sympathetic, we cannot allow the exceptions to be stretched beyond their justifications. As the Court noted in *Chick Kam Choo*, "the exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.' " 486 U.S. at 146 (citation omitted). Moreover, the district court plainly recognized that there were two types of claims at issue – those wholly dependent upon the prior declaratory judgment (the direct claims as judgment creditors) and those "inextricably intertwined" with the issues settled by the declaratory judgment (the post-declaratory judgment claims).

The district court therefore did not enjoin the post-declaratory judgment claims in order to "sort things out"; rather, it did what it said it was doing – enjoining the Cameron County action because the state court "could irreparably injure the Court's ability to decide the present case." *Royal*, 759 F. Supp. at 1235. As noted above, however, the only irreparable injury that the state court posed was deciding the claims. This sort of "interference" is not sufficient to overcome the obstacle of the Anti-Injunction Act.

IV.

Finally, we consider the various motions, pending in this court, to prevent the district court from considering aspects of the case not directly at issue in this appeal. Prior to oral argument, the appellants asked us to stay the district court proceedings pending appeal. Essentially,

this would have prevented the district court from considering the merits of the appellants' tort, waiver, and estoppel claims brought as affirmative defenses to Royal's request for declaratory judgment. We denied the motion without opinion on September 6, 1991.

After oral argument, on October 29, the appellants submitted a motion to reconsider the motion for stay of the district court proceedings. On December 20, while the motion for reconsideration was pending, the district court disposed of, *inter alia*, the post-declaratory judgment claims adversely to the appellants. By a December 24 letter, the appellants asked us to "vacate all orders entered by the court below during the pending of the improperly issued preliminary injunction, including the December 20, 1991 summary judgment order" covering the post-declaratory judgment claims. Thus, the motion for reconsideration is partially mooted[19] by the orders of the district court, and we now consider the appellants' request to vacate the orders entered while this appeal was pending.

We decline to vacate these orders. As noted above, the appellants' tort, waiver, and estoppel claims were before both the federal district court and the Cameron County court. There was always the possibility that the federal court would win the race to judgment; in fact, the odds were heavily in the federal court's favor. It had dealt with the litigation among these parties for over three years by the time the tort, waiver, and estoppel

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[19] The district court did not rule on Royal's request for a permanent injunction, deferring that issue pending the outcome of this appeal.

claims were placed before it on August 15, 1990; therefore, it was familiar with the facts and legal disputes. By contrast, the Cameron County court's first exposure to the case was September 4, 1990, when the appellants filed their suit.

At most, what the district did by enjoining these claims was to ensure it would win the race. We are well aware of the general rule that parallel state and federal actions should be allowed to proceed without interference from either court. *Atlantic Coast Line*, 398 U.S. at 295-96. Vacating the orders of the district court, however, would do nothing to put the state and federal courts back on an even footing. Indeed, the district court would be free to re-enter its orders the moment after they were vacated. Thus, even if vacating orders would be appropriate in some cases, it would merely be an academic exercise in this case.

Finally, we note that the equities do not weigh in the appellants' favor. They created this tangled web of litigation by seeking to evade the effect of the first declaratory judgment action: Having encountered a roadblock in federal court, they brought their claims to state court, collusively obtained an inflated default judgment there, and sought to collect that judgment (and more) in another state court. That their "victory" on the "in aid of jurisdiction" question is a somewhat hollow one does not persuade us to vacate the district court's orders. The appellants presumably may appeal the district court's disposition of their tort, waiver, and estoppel claims.

V.

In conclusion, we find that the district court had ancillary jurisdiction over this matter. In addition, we find that the portion of the injunction based upon the relitigation exception – the injunction of the appellants' direct claims as judgment creditors under the insurance contract – was proper. We further find that the portion of the injunction based upon the "in aid of jurisdiction" exception – the injunction of the appellants' tort, waiver, and estoppel claims brought as assignees – was improper. We therefore AFFIRM in part, REVERSE in part, and REMAND. Finally, we DENY the appellants' request to vacate the district court's orders entered during the pendency of this appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1808

ROYAL INSURANCE COMPANY OF AMERICA and
ROYAL LLOYDS OF TEXAS,

Plaintiffs-Appellees,

versus

QUINN-L CAPITAL CORPORATION, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 09/27/93, 5 Cir., ___, ___ F.2d ___)

(November 5, 1993)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Judge Higginbotham did not participate in the consideration of the suggestion of rehearing en banc.

PETITIONERS FOR WRIT OF CERTIORARI

Arthur R. Miller is Counsel for the following Petitioners: QUINN-L CAPITAL CORPORATION, QUINN-L FINANCIAL CORPORATION, QUINN-L EQUITIES, INC., QUINN-L MANAGEMENT CORP., QUINN-L MORTGAGE CORP. (collectively, "Quinn-L").

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Supreme Court, U.S.
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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

QUINN-L CAPITAL CORPORATION, et al.,

Petitioners,

v.

ROYAL INSURANCE COMPANY OF AMERICA, and ROYAL LLOYDS OF TEXAS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA and ROYAL LLOYDS OF TEXAS	*	Civil Action No. 3-90-0550-H
Plaintiffs	*	
v.	*	
QUINN-L CAPITAL CORPORATION, *et al.*	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER[1]

(Filed Dec. 20, 1991)

Before the Court are

1. Defendants' William O. Akin, William Bradley, Michael Cummins, Jorge Y. Herszage, Bonner H. Jackson and James L. Tucker Motion to Dismiss Pursuant to Rule 12(b)(7) and Brief in Support Thereof, filed August 29, 1991; and Plaintiffs' Opposition to Defendants' Motion to Dismiss, filed September 12, 1991.

2. Supplement to Defendants' Rule 56(f) Motion for Continuance and for Reopening of Discovery Due to Plaintiffs' Continued Failure to Produce Over One Thousand Documents,

[1] For the purposes of this Order, the Plaintiffs in this action will be referred to as "Royal," and the multiple Defendants as "Quinn-L."

filed September 30, 1991; and Plaintiffs' Opposition to Defendants' Motion, filed October 17, 1991.

3. Plaintiffs' Motion for Summary Judgment and supporting documents ("Royal's Memorandum"), filed July 30, 1991; Defendants' Opposition to Plaintiffs' Motion and supporting documents ("Quinn-L's Opposition Brief"), filed October 1, 1991; and Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, filed October 22, 1991.

4. Plaintiffs' Motion to Strike All or Parts of Affidavits Offered by Defendants in Opposition to Plaintiffs' Motion for Summary Judgment and supporting documents, filed October 16, 1991; and Defendants' Opposition to Plaintiffs' Motion and supporting documents, filed November 5, 1991.

5. Plaintiffs' Application for Declaratory and Permanent Injunctive Relief, filed July 30, 1991; and Defendants' Opposition to Plaintiffs' Application and supporting Brief, filed September 30, 1991.

The Court considers the motions in the order presented above.

I. Factual Summary[2]

This case finds its inception in May of 1987 when twenty-six lawsuits were brought in the U.S. District Court for the Northern District of Texas by some 157 investors (the "Investors") who allegedly lost money they had invested in various syndicated real estate investments offered or managed by one or more of the Defendant Quinn-L entities. The suits were filed against the numerous Quinn-L entities ("Quinn-L") and Mark Lovell[3]. The Investors asserted claims under the federal

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[2] This factual summary is largely drawn from this Court's previous findings of fact in its grant of preliminary injunction in *Royal Ins. Co. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216, 1218-27 (N.D. Tex. 1990) ("*Royal*" or "Preliminary Injunction Order").

Findings of fact and conclusions of law made in connection with a preliminary injunction are not binding. The Court may come to different conclusions at the trial on the merits. *See University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Mylett v. Jeane*, 910 F.2d 296, 299 (5th Cir. 1990). However, reliance on such findings of fact in considering a motion for summary judgment is appropriate as long as the party opposing the motion does not present specific facts that dispute a material finding. *See generally* discussion of standard for granting summary judgment, *infra* pages 14-15. In the absence of any material issue of fact, other courts have similarly adopted findings of fact from the preliminary injunction stage in granting a motion for summary judgment. *See Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1205-06 (7th Cir. 1985); *Massachusetts Law Reform Institute, Inc. v. Legal Services Corp.*, 601 F. Supp. 415, 417 (D.C. 1984).

[3] Lovell is the sole shareholder of all of the Quinn-L entities, except for Quinn-L Capital Corporation. Lovell is the sole owner of all of the voting stock of Quinn-L Capital Corporation and is the beneficial owner of all of its assets. Since January of 1989, Quinn-L Capital Corporation has had officers, directors,

securities and anti-racketeering laws, as well as under Texas law. The twenty six lawsuits brought by the Investors against Quinn-L and Lovell were consolidated by the Court into one case (the "Federal Liability Suits").

Subsequently, Quinn-L, through the Dunn-Odom Insurance Agency Inc., requested that Royal defend them in the Federal Liability Suits, which Royal agreed to do subject to a reservation of rights. Quinn-L accepted this qualified defense by Royal. On May 10, 1988 Royal filed a separate declaratory judgment action in this Court (the "First Federal Declaratory Judgment Action"), seeking a declaration that it owed no duty to defend, and no duty to indemnify Quinn-L for any claims brought in the Federal Liability Suits. *See Royal Insurance Company of America v. O-L Investments, Inc.*, No. CA3-88-1069-H.

On June 6, 1988 the Investors moved to intervene in the First Federal Declaratory Judgment Action, alleging that they needed to protect their bona fide interests. The Court denied the Investors' Motion to Intervene.

On April 14, 1989 the Court granted Royal's Motion for Partial Summary Judgment in the First Federal Declaratory Judgment Action, concluding that Royal's policies did not impose any duty to defend or indemnify Quinn-L against the Investors' claims in the Federal Liability Suits. The Court found that none of the Investors' allegations constituted an "occurrence" or "property

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or significant assets, and Lovell has had sole authority to act for the Quinn-L Capital Corporation. As a result, for the purpose of brevity, the Court's reference to Quinn-L will also include Lovell.

damage" as required by the policy. The Court further held that the Investors had not shown that personal injuries in the form of mental anguish were caused by an occurrence. The Court formally entered partial summary judgment against Quinn-L on April 27, 1989, enumerating therein the cause numbers of the suits then pending as the consolidated Federal Liability Suits ("Partial Summary Judgment").

In a report filed May 4, 1989 Quinn-L notified the Court that in view of the Partial Summary Judgment, aside from the issue of attorneys' fees, no issues remained to be litigated in the case. On July 28, 1989 Royal and Quinn-L submitted a stipulation of facts to the Court acknowledging that many policies not specifically enumerated in the Court's Partial Summary Judgment nevertheless fell within the scope of the Court's ruling. On September 8, 1989 the Court entered a Final Judgment in the First Federal Declaratory Judgment Action that consolidated the terms of the April 27, 1989 Partial Summary Judgment, the May 4, 1989 Quinn-L Report, and the July 28, 1989 Stipulation entered into between Quinn-L and Royal ("Final Judgment"). This Final Judgment was not appealed.

Just prior to the entry of the Final Judgment, on August 28, 1989 in response to the Investors' Motion to Dismiss the Federal Liability Suits, the Court dismissed the Plaintiffs' federal claims with prejudice, and dismissed Plaintiffs' remaining state law claims without prejudice, pursuant to the rules established by *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The Investors' Motion to Dismiss represented that "Plaintiffs and these

Quinn-L Defendants have reached an agreement in principle for settlement of plaintiffs' claims" and requested the dismissal in order to "further streamline the litigation pending in this Honorable Court." *Royal*, 759 F. Supp. at 1216, 1222 n.7 (N.D. Tex. 1990).

Approximately two weeks after the dismissal, on September 14, 1989 the Investors filed a lawsuit against Quinn-L in the 298th Judicial District Court of Dallas County, Texas, styled *Adkisson v. Quinn-L Capital Corporation*, Cause No. 89-11030-M ("*Adkisson*"). *Adkisson* was based on the same transactions and alleged claims identical to the state-law claims originally brought in the earlier Federal Liability Suits.

In October of 1989, Lovell, on behalf of Quinn-L, directed his personal attorney to request a defense of *Adkisson* from Royal. Royal offered a defense subject to a reservation of rights, and retained an attorney, Coyt Randall Johnston, to represent the Quinn-L Defendants pending a response to its offer of qualified defense. At the time an answer was due in *Adkisson*, Quinn-L had made no effort to obtain independent counsel to enter an appearance, and Johnston filed a general denial to Plaintiffs' petition in *Adkisson* on November 17, 1989.

On January 9, 1990 Lovell rejected Royal's offer, and demanded an unqualified defense. Royal refused to provide Quinn-L an unqualified defense, and instructed Johnston to take no further action in *Adkisson*.

The evidence conclusively establishes that Lovell, on behalf of Quinn-L, refused Royal's offer of a defense subject to a reservation of rights at the urging of the Investors, and because of a Compromise and Settlement

Agreement entered into by the Investors, on the one hand, and Lovell, his wife, and Ogden Sutro (all of whom were individual Defendants in the Federal Liability Suits), on the other ("Settlement Agreement"). The Settlement Agreement had been signed on April 5, 1989, while the Federal Liability Suits and the First Federal Declaratory Judgment Action were pending. The sole purpose of the Settlement Agreement was to pursue Royal. *See Royal* 759 F. Supp. at 1224.

Adkisson was called for trial in state court on August 7, 1990. No appearance was made on behalf of the Quinn-L Defendants. Based on the evidence presented by the Investors, the Dallas state district court entered a default judgment against Quinn-L for more than $740 million. As outlined in detail in *Royal*, the lack of representation of Quinn-L and the resulting default judgment were caused directly by the Investors' Settlement Agreement and collusion with Lovell. *See id.* at 1224-26.

On September 4, 1990 Quinn-L, through Lovell, executed an Assignment of its rights and causes of action, if any, against Royal and its agents to the Investors (the "Assignment"). By the terms of the Assignment, the Investors agreed to pay Quinn-L ten dollars ($10) and Lovell personally five percent (5%) of any future recoveries against Royal in excess of the $740 million *Adkisson* default judgment.

On the same day the Assignment was executed, September 4, 1990 the Investors filed suit in the District Court for the 107th Judicial District, Cameron County, Texas, in Cause No. 90-09-4464-A (the "Brownsville Liability Action"). In that action, the Investors sought, as